92-5

(1)

Supreme Court, U.S.
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No. 92 ____

IN THE

Supreme Court of the United States

October Term, 1992

RICHARD J. MACKENSWORTH,

Petitioner, Pro Se,

vs.

SEA-LAND SERVICE INC., & UNITED STATES OF AMERICA (MARAD),

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

RICHARD J. MACKENSWORTH
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Dated: June 29, 1992

Seamans Personal Injury Claim
Filed Pursuant to 28 U.S.C. 1916

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(8248—LC6-591—1992)

QUESTIONS PRESENTED FOR REVIEW

I. Whether the infamy of judicial larceny, at the District Court level, and as countenanced by the Ninth Circuit U.S. Court of Appeals, is of such special importance as to trigger the Judicial Conscience of this Honorable Court?

II. Whether this case is to become the most recent example of the Seamans Personal Injury Claim/Superior Priority Lien, getting no money, in an Admiralty Foreclosure Action, and a Non-Parties Lawyers getting heavy money as excess proceeds of sale?

III. Whether where bond/surety is a condition of " 'Transfer' ", and avoidance of Docketed filed Claims occurs, and Statutory requirement " 'For Bond' " is not met, will this Honorable Court Order Proper Bond posted?

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NO STAKE IN OUTCOME PARTIES*

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No. 92 ____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992.

RICHARD J. MACKENSWORTH,

Petitioner, Pro Se,

vs.

SEA-LAND SERVICE INC., and UNITED STATES OF AMERICA,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Judgment—Opinions—Orders

IN A 'NOT FOR PUBLICATION' MEMORANDUM OVERVIEW, The Decision of the United States Court of Appeals, for the Ninth Circuit, concluded and said in the aggregate:

This *PRO SE* Litigant, despite His preferred maritime lien, The Superior Priority Lien in the action, Has not the favor of the Court, therefore *appeal is dismissed, rehearing denied.*

MY CLAIM & PRIORITY SUFFERED BY SERIOUS DEPARTURE FROM THE RULES

Judgment—Opinions—Orders

As and for the Judgment—Opinions—Orders of which review is sought.

CR 157 . . . ORDER TO DISBURSE EXCESS PROCEED OF SALE

In this disbursement without findings of priorities, the Court determined, 'enough' money was available to pay all claims!

The Court should also have determined that *proper parties* and priority claims would be paid (See CR 143)

CR 165 . . . ORDER RE MOTION FOR INJUNCTIVE RELIEF

The District Court *finding no defects* in appearances, and the 9th Circuits, "NO COMMENT", are plain cronyism. (See CR 134 *et seq.*)

CR 230 . . . ORDER DENYING MOTION TO AMEND AND GRANTING TRANSFER

THAT THEY *PERVERT MY DOCUMENTS* From a *"Notice of Joinder" to a Motion to Amend*, is clearly collusion, to reduce amount of Bond/surety. (He, post's)

Additionally, I think it is an *abuse of* discretion for the District Court to have ruled on the "Notice of Joinder at all," and especially in "Their" Tranfer Motion.

CR 242 . . . CERTIFICATE OF COMPLIANCE

IN VIEW OF District Court's *UNFILING OF JOINDER CLAIM* ($500,000.) in CR 230, Sea-Lands Letter of Undertaking (CR 242) *expressly limits* Their "undertaking" to claim of $44,000. (CR 8), And Corruptly sneers at My verified claim of/for $500,000. at CR 212 (A dismissal of Joinder, unfavored by F.R.C.P.) *clearly dismissal* of *"Joinder"*

CR 245 . . . ORDER CONCERNING TRANSFER OF ACTION

INCREDIBLY, the non-party insuror is Awarded an Illegal Disbursement of $18,000. *from sale fund.* (To fight my claim in SDNY)

Is This patronage or corruption?

CR 271 . . . ORDER CONCERNING PROCEEDS OF SALE

Affidavit averring *Sea-Land is Sole Claimant,* and no prejudice will occur to any Claimant. (This is a false Statement in Spades, I AM A CLAIMANT!)

CR 272 . . . ORDER AS TO APPLICATION OF SEA-LAND FOR PARTIAL DISBURSEMENT OF SALE PROCEEDS.

(Over $5 Million, Service not made on me)

This *Ex parte* application was signed, during Christmas Holiday, 1989, AND NOT BY ASSIGNED JUDGE.

CR 293 . . . ORDER FOR FINAL DISTRIBUTION

This was objected to by me at CR 283, but of no consequence, as the 'real' money was disbursed in the *interlocutory*

Order at CR 272. / Claim of Respondent Sea-Land, "That" No other Party Stands before the Court, in the *in rem* Action is based on the Fact "That" The Superior - Priority Lien (ME) has been Transferred to New York, Why?

FOR THE CONVENIENCE OF WITNESSES and that therefore the Transferee party (ME) is no longer an entity or Claimant in the - Original Action. (See CR 283, Objection to the Final Malfeasance)

Jurisdiction

This petition seeks review of the overview of the United States Court of Appeals for the Ninth Circuit, Rehearing entered on April 1, 1992. Consequently, jurisdiction is appropriate pursuant to 28 U.S.C. § 1254(1). This Petition for Writ of Certiorari was timely filed pursuant to 28 U.S.C. § 2101(c).

Date of Entry of Judgment or Decree Sought to be Reviewed

CR	157	'pen-dix	I	Entered	8-1-88
CR	165	"	II	"	8-12-88
CR	230	"	III	"	7-31-89
CR	245	"	IV	"	8-11-89
CR	271	"	V	"	12-22-89
CR	272	"	VI	"	12-26-89
CR	293	"	VII	"	8-1-90
Memo. U.S. Ct. of Appeal 9th Circuit		"	VIII	"	2-27-92
REHEARING DENIED				"	4-1-92

Statutes Presented for Review

46 § 953 Preferred maritime lien; priorities; other liens

(a) When used hereinafter in this chapter the term "preferred maritime lien" means (1) a lien arising prior in time to the recording and endorsement of a preferred mortgage in accordance with the provisions of this chapter; or (2) a lien for damages arising out of tort, for wages of a stevedore when employed directly by the owner, operator, master, ship's husband, or agent of the vessel, for wages of the crew of the vessel, for general average, and for salvage, including contract salvage.

(b) Upon the sale of any mortgaged vessel by order of a district court of the United States in any suit in rem in admiralty for the enforcement of a preferred mortgage lien thereon, all pre-existing claims in the vessel, including any possessory common-law lien of which a lienor is deprived under the provisions of section 952 of this title, shall be held terminated and shall thereafter attach, in like amount and in accordance with their respective priorities, to the proceeds of the sale; except that the preferred mortgage lien shall have priority over all claims against the vessel, *except (1) preferred maritime liens*, and (2) expenses and fees allowed and costs taxed, by the court.

Italics added—

Admiralty and Maritime Supplemental Rules

Rule C. Actions in Rem: Special Provisions

C(2) Complaint. In actions in rem the complaint shall be verified on oath or solemn affirmation. It shall describe with reasonable particularity the property that

is the subject of the action and state that it is within the district or will be during the pendency of the action. In actions for the enforcement of forfeitures for violation of any statute of the United States the complaint shall state the place of seizure and whether it was on land or on navigable waters, and shall contain such allegations as may be required by the statue pursuant to which the action is brought.

* * *

C(6) Claim and Answer; Interrogatories. The claimant of property that is the subject of an action in rem shall file his claim within 10 days after process has been executed, or within such additional time as may be allowed by the court, and shall serve his answer within 20 days after the filing of the claim. The claim shall be verified on oath or solemn affirmation, and shall state the interest in the property by virtue of which the claimant demands its restitution and the right to defend the action. If the claim is made on behalf of the person entitled to possession by an agent, bailee, or attorney, it shall state that he is duly authorized to make the claim. At the time of answering the claimant shall also serve answers to any interrogatories served with the complaint. In actions in rem interrogatories may be so served without leave of court.

Rule E. Actions in Rem and Quasi in Rem: General Provisions

(5) Release of Property.

(a) *Special Bond.* Except in cases of seizures for forfeiture under any law of the United States, whenever process of maritime attachment and garnishment

or process in rem is issued the execution of such process shall be stayed, or the property released, on the giving of security, to be approved by the court or clerk, or by stipulation of the parties, conditioned to answer the judgment of the court or of any appellate court. The parties may stipulate the amount and nature of such security. In the event of the inability or refusal of the parties so to stipulate the court shall fix the principal sum of the bond or stipulation at an amount sufficient to cover the amount of the plaintiff's claim fairly stated with accrued interest and costs; but the principal sum shall in no event exceed (i) twice the amount of the plaintiff's claim or (ii) the value of the property on due appraisement, whichever is smaller. The bond or stipulation shall be conditioned for the payment of the principal sum and interest thereon at 6 per cent per annum.

(b) *General Bond.* The owner of any vessel may file a general bond or stipulation, with sufficient surety, to be approved by the court, conditioned to answer the judgment of such court in all or any actions that may be brought thereafter in such court in which the vessel is attached or arrested. Thereupon the execution of all such process against such vessel shall be stayed so long as the amount secured by such bond or stipulation is at least double the aggregate amount claimed by plaintiffs in all actions begun and pending in which such vessel has been attached or arrested. Judgments and remedies may be had on such bond or stipulation as if a special bond or stipulation had been filed in each of such actions. The district court may make necessary orders to carry this rule into effect, particularly as to the giving of proper notice of any action against or attachment of a vessel for which a general bond has been filed. Such bond or stipulation shall be endorsed

by the clerk with a minute of the actions wherein process is so stayed. Further security may be required by the court at any time.

If a special bond or stipulation is given in a particular case, the liability on the general bond or stipulation shall cease as to that case.

Rule 18(a) F.R.C.P.

JOINDER OF CLAIMS AND REMEDIES

18(a) Joinder of claims. A party asserting a claim to relief as an original claim, counter claim, cross-claim or third-party claim, may join, either as independent or as alternate claims, as many claims, legal, equitable, or maritime, as *he has* against an opposing party.

The meaning, language, and intent of 18(a) is crystal clear: I can join as many claims as *I have*.

ADVISORY COMMITTEE NOTES ON RULES—
1966 Amendment.

(b) FROM RULE 18—F.R.C.P. Notes of Advisory Committee on Rules 1966 Amendment—Page 526—

The Rules "proceed upon the theory that no inconvenience can result from the joinder of any two or more matters in the pleadings, but only, from trying two or more matters together which have little or nothing in common." Sunderland, The New Federal Rules, 45 W. Va. L.Q. 5, 13 (1938); see Clark, Code Pleading 58 (2 ed. 1947). Accordingly, Rule 18 (a) has permitted a party to plead multiple claims of all types against an opposing party, subject to the court's power

to direct an appropriate procedure for trying the claims.—See Rules 42(b), 20(b), 21.

46 U.S.C. 763(a)

§ 763a. Limitations

Unless otherwise specified by law, a suit for recovery of damages for personal injury or death, or both, arising out of a maritime tort, shall not be maintained unless commenced within three years from the date the cause of action accrued.

(Pub.L. 96-382, § 1 Oct. 6, 1980, 94 Stat. 1525.)

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

PACIFIC FAR EAST LINES, INC.,

Defendant,

and

PACIFIC FAR EAST AND MARITIME EMPLOYEES ASSOCIATION,

Claimant-Appellant.

No. 85-2750

D.C. No.
C-79-2253-CAL

OPINION

Argued and submitted December 12, 1986—San Francisco, California.

Filed February 12, 1987.

Before: Anthony M. Kennedy, Thomas Tang and David R. Thompson, Circuit Judges.

Opinion by Judge Thompson.

Appeal from the United States District Court for the Northern District of California.

Charles A. Legge, District Judge, Presiding.

Summary

Admiralty/Bankruptcy

Appeal from grant of summary judgment. Adopting portions of the district court's opinion, the district court's judgment is affirmed.

United States v. Pacific Far East Lines

[1] Only preferred maritime liens take priority over a preferred ship mortgage. [2] The claims by Association are for loss of pay and employment benefits by shoreside employees. Therefore, this court concludes that their claims are not maritime claims and do not give rise to maritime liens. This court rejects the Association's argument that the government waived the protection of the Federal Torts Claims Act and has consented to be sued by filing this action. This suit is not a waiver and consent to be sued for torts.

COUNSEL

Philip A. Berns, San Francisco, California, for the plaintiff-appellee.

Richard Harrington, San Francisco, California, for the claimant-appellant.

Highlighting Some Case Law

I pointed out to the Court (Below) among other things:

(a) JUDGMENT—ORDER OF PAYMENT AND PRIORITIES

"Claims for maintenance, wages and damages for personal injuries sustained by member of crew, constituted 'preferred maritime liens' under this section and would take priority over mortgage whether they arose before or after recordation of mortgage. CR 143, Pg. 7, *Crabtree v. The Julia*, C.A. Tex. 1961, 190 F. 2d 478 - and 46 USCA 953.

(b) Any ambiguity in this section, relating to preferred maritime liens for wages of crew of vessel, must be resolved in favor of seaman, since it is a historic maxim of admiralty courts that seaman shall be accorded special consideration and protection. CR 143, Pg. 7, *The Herdis*, D.C. Md. 1927, 22 F.2d 304, 46 USCA 953.

(c) "Payment before expiration of appeal time—

Distribution of proceeds from sale of disabled vessel divested district court and Court of Appeals of *in rem* jurisdiction and district court would not be required to attempt to compel distributees to repay funds into registry to re-establish *in rem* jurisdiction in view of failure of lienholders to attempt to restrain distribution.

See *American Bank of Wage Claims v. Registry of District Court of Guam*, C. A. Guam 1970, 431 F 2d 1215.

(d). . . since the law fixed the order of priority of liens and it was the duty of the courts to see that they were properly enforced. (*The Charles D. Leffler*, C.C.A.N.J. 1988, 100 F. 2d 759)

IN THIS ACTION, THERE WAS NO/NOT FAILURE TO ATTEMPT TO RESTRAIN DISTRIBUTION—See CR 143 & 144 And My attempt to restrain distribution on/in My APPEAL, Petition for Mandamus, and Direct Appeal to Chief Judge of the Northern District of California, ALL FAIL. (See CR 171, CR 279 & CR 280)

Appeal and Mandamus were directed to *Ninth Circuit* U.S. Court of Appeals.

AFTER INTERVENTION,
SO LONG PRIORITIES

I who "intervened" in the case early on, saw in the first Status Conference Hearing, what was to become "*bad news*" for "intervenors."

From The Reporter's Transcript.

February 19, 1988

In the words of U.S. ATTORNEY P. A. BERNS, AND THE COURT:

Court: *Is your mortgage the first priority?*

Mr. Berns: *It isn't a question of priority, there is enough money* here. (RT, 2/19/88, Pg. 6: 8-10)

(a) THE COURT: If the claims are—affidavit, and they're legitimately—

MR. BERNS: No, *I'm saying we don't even assume legitimacy.*—Appendix, Pg.—(From: RT 2-19-88, Pg. 8: 6-7 & 11-12)

(b) MR. BERNS: On the other aspects of how to resolve the claims, if we *first meet with* the people I have mentioned, and particularly the *insurance people*, as to whether they're going to, let's say defend against the personal injury claims—Pg. 9: 18-21 *ibid*-[A.]

(c) MR. BERNS: The *personal injury people obviously have claimed priority over our mortgages.*—Pg. 10: 11-13—*ibid*—[A.]

(d) *SO WE'VE GOT TO BREAK THEM DOWN INTO GROUPS, AND SEE HOW WE CAN DISPOSE OF, LET'S SAY, THOSE WHO CLAIM TO HAVE PRIORITY* (Pg. 10: 14-16) [a.]

(E) *AND*

THAT WAY WE'LL BE ABLE TO WIPE OUT A LOT OF CLAIMS. Ibid. (Pg. 10:21)

U.S.A.'S LESSOR PRIORITY LIEN

Despite the "lessor priority" status of the U.S.A.'s lien(s), *they pressed on to convince the Court below,* they *should be paid first, from the so called excess.*

NOWHERE in the U.S.A.'s "MOTION PAPERS" to disburse "so called 'excess proceeds of sale' " DO THEY MAKE THE CLAIM *specifically* that their "first preferred mortgage" has priority over any other claim-in-intervention, let alone, the "preferred maritime liens." (See CR 157, Pg. 2 & 3)

They, U.S.A. (U.S. ATTORNEY, said enough money would be left to pay all claims. (See CR 127, Pg. 3: 1-13)

Statement of the Case

FILING AND START OF ACTION

On September 23, 1987, this case was filed as a "First Preferred Mortgage" *in rem*, by the United States of America (U.S.A.) claiming liens and defaults of payment(s) in or near 80% of the agreed sale amount (under 46 U.S.C.A. 951).

ONCE ACTION FILED

And (in law), THE "First Preferred Mortgage" becomes a lien subordinate to the "Preferred Maritime Lien" (see 46 U.S.C.A. 953(a) *et seq.*).

ADVERTISING ACTION AND ARREST

This may have the effect of attracting unwanted "Intervenors" with higher priority liens, and usually does.

I INTERVENED AND MY VERIFIED CLAIMS

My verified claim in this action, for *personal injury damages* was filed on September 25, 1987, NOT December 17, 1987, in the amount of $44,000. And, added *onto* by verified claim by *Joinder* on July 10, 1989, in amount of $500,000. (See CR 8 and CR 212).

The Vessel S.S. AMERICAN MERCHANT was subsequently Arrested, Sold, Sale was Confirmed, and the proceeds of Sale were deposited in the Repository of the Court.

The Sale price of the subject Vessel (S.S. American Merchant) being in the exact amount of FIVE MILLION ($5,000,000.) dollars.

The " 'Foreclosure Action' " initially involved Five (5) Vessels, that were being tried as related cases before a single Judge.

A SIXTH VESSEL, a " 'Related Case' " in the same Action, was to be soon arrested and sold, entry of the "Sixth Vessel" into the Related Action brought with " 'It' " a *peculiar* 'Sister-Ship'/Fleet Mortgage relationship, with the Ship I am suing.

At any rate The Clerk of the Court issued A COMBINED CHECK, in the amount of $5,432,648.75, as " 'remnants' " of the proceeds of sale of the Two (2)—Vessels, *PAYABLE TO SEA-LAND*.

IN OTHER WORDS, It Is Not A shortage of Proceeds of Sale that prevents Respondent SEA-LAND From Posting " 'Proper Bond' " In Amount of $1,088,000., in the Transferee District, As Required by Rule E(5)(a) *et seq*. Supp. R.

Confession of Judgment(s)

This action involved a "Confession of Judgment(s)" which for *adequate consideration* (money), WAIVED all rights to restitution of the vessel and the right to defend this action on the vessel's behalf, endorsed by the Ship-Owner Trustee as predecessor assignor in interest to Sea-Land (Respondent here).

And which reads in pertinent part as follows:

4. CINB as Shipowner Trustee specifically waives any and all right it may have to claim restitution of the Vessel and to defend this action on the Vessel's behalf.

Importantly here Continental Illinois National Bank of Chicago (CINB), waived for themselves and their successor

assignee Sea-Land . . . any and all right it may have . . . to defend this action on the Vessel's behalf. (See CR 19, Pg. 2:20)

Thus CINB had *no claim or right* to defend (the Vessel) that it could assign to Sea-Land.

Significantly Sea-Land did not Claim and Answer (for themselves) as required by Rule C(6) of the Supplemental Rules for Certain Admiralty and Maritime Claims (Supp. R.), therefore any reasonable reading of the Confession of Judgment clearly puts Sea-Land in default of. the Default Order (CR 94) as to further Intervenors, entered on the Docket on February 22, 1988.

Sea-Land filed a Notice of Assignment Appearance on MARCH 10, 1988. IF Sea-Land ever had a Right to Claim and Answer pursuant to Rule (24) FRCP, they certainly did not exercise it.

WHY THE CONFESSION OF JUDGMENT(S) ADEQUATE CONSIDERATION (of course)

Part of the reason is to be found at CR 19, page 3:7-9.

"For we are there referred" to the Bankruptcy Court Order (Docket 893) of July 24, 1987.*

And in the said Order (July 24, 1987) on page 10, is written, "It is anticipated there will be net proceeds accrued to the Debtor's estates of at least $17 million dollars (this is for the Debtor, U.S. Lines) (McLean Ind. *et al.*, Case # 86B 12238-86B 12241). *July 24, 1987 Order and Purchase Agreement are incorporated by reference at CR 23—Exhibit D, Pgs. 3:28 & 4:7-8).

AS AND FOR THE OWNERS (INCL. CINB)
AS SHIPOWNER TRUSTEE

An Agreed Order providing adequate protection for beneficial owners in the amount of $4.6 million, this is listed at paragraph 3a and 3b of the said Agreed Order.

As can be seen above there is considerable inducement for the Confession of Judgment to be worthwhile. (For the then Owners and Debtors.)

The process described above has most of the ingredients essential to invoke the wrath of " 'Legal Consequences' " described in *Overmyer v. Frick*, 92 S. Ct. 775 (1972).

Overmyer v. Frick

92 Supreme Court Reporter 776
405 U.S. 174

4. Constitutional Law Key 43(1)

4. Where case did not involve an unequal bargaining power or overreaching, and the agreement from the start was not contract of adhesion, and maker's execution and delivery of second note, which contained cognovit provision which first note had not contained, were for adequate consideration and were product of negotiations carried on by corporate parties with advice of competent counsel, and maker despite cognovit, was not defenseless under state law, maker voluntarily, intelligently and knowingly waived due process rights it otherwise possessed to prejudgment notice and hearing, and did so with full awareness of legal consequences. R.C. Ohio ¶ 2323.13, 2323.13(c); U.S.C.A. Const. Amend. 14.

Relationship Between Sea-Land and CINB

RE: S.S. AMERICAN MERCHANT

Actual legal title to the vessel . . . was held by CINB . . . CINB, in its capacity as Trustee for the Owners, also filed a claim in this action pursuant to Supp. R. C(6).

When all the conditions of the Agreed Order had been fulfilled, Owners assigned to Sea-Land all their ownership interest in and to the MERCHANT . . . (.)

CINB, for themselves and for their successor assignee (Sea-Land) *filed the only* claim required to be made by Supp. R. C(6) and IN WHICH THE DEMAND MUST BE MADE FOR RESTITUTION (of the property) AND THE RIGHT TO DEFEND THE ACTION.

CINB waived the right to claim restitution, and the right to defend on the vessel's behalf. (See CR 19 entered on October 21, 1987.)

Thus: CINB *et al.*, took the " 'Adequate Consideration' " money, and executed the Confession of Judgment, "*their choice*" leaving Sea-Land with the legal consequences spelled out in

Overmyer v. Frick

AND NO LEGAL STANDING IN THIS ACTION.

JOINDER CLAIM:

I ASSERTED/FILED my *Joinder Claim,*

Joinder

July 10, 1989, as Docket # CR 212, pursuant to Rule 18(a) F.R.C.P.

The U.S. Attorney's Office/staff in 'CR 214' 2:10-14, filed on July 14, 1989, URGED THE COURT, to pervert/treat "the Joinder" as a *Motion to Amend. 'The Court later did.'* THUSLY:

"The Court shall treat Mackensworth's 'joinder' motion as a motion to amend, pursuant to Fed. R. Civ. P. 15 (a). Rule 18(a) deals only with pleading requirements, and does not treat substantively whether a party may amend his original complaint to include new claims. *See* Rule 18 Advisory Committee notes "from CR 230, 2:17-22" [A. 81-85]

Transfer

Motion to Transfer Jurisdiction

Sea/Land wants to transfer me

SHORT HISTORY

(a) By "joint motion" entered on June 30, 1989, SEA-LAND and UNITED STATES LINES, moved the Court below, for Order transferring my complaint-in-intervention to the District of New Jersey.

(b) BEST SERVE

"They" say at Docket #206, that the transfer "will *best serve the convenience* of 'the' *parties and witnesses,*" and is in the "*interest of justice.*" *CONTINENTAL GRAIN v. BARGE* FBL-585, 346 U.S. 19 *et seq.*

The legality of transfer per se has never been challenged *by me*.

The Letter of Undertaking

"In a word," "they" want to post a "letter of undertaking" which purports to undertake a defense of claim, in amount of

$44,000, *AND TAKE THE CASH OF over 5 million* (and they got it) (later). See CR 272—Dec. 26, 1989 [A. 104-5]

Compliance not in "Letter"

HOWEVER you look at it, compliance with Order #230 in re "Supp. R." E(5) a and b is not there to cover all claims on appeal pursuant to Rule E(5)(a) *et seq.*

Transfer and Sub. Security

Transfer of my claim from N/D California to SDNY WAS MOVED by Appellees Sea-Land and United States Lines at *CR 206 et seq.* AND AFFIRMED by the Court below conditioned on proper Bond/Security being posted pursuant to Rule E(5)(a) Supp. R.FRCP. (See CR 230, Pg. 5:1-9)

Posting of Bond/Security is not limited to what "they" (Movants of Transfer) think I am *entitled to assert* or WHAT *they* allow!!

Posting Bond

11. But the posting of any Bond/Security is *clearly based on claims I have filed*, IN DOUBLE THE AMOUNT OF THE CLAIMS I HAVE FILED, and on NOTHING ELSE, for any other "Ruling" surely puts the U.S. Attorney, appellees, and Judge in the position of being Prosecutor, Jury and Judge and more than effectively constitutes DENIAL OF DUE PROCESS. (See Rule Supp. R. E(5) (b).)

Factual Discussion

On September 23, 1987, this case was filed as a First Preferred Mortgage *in rem* by the United States of America (U.S. A.) claiming liens and defaults of payments.

Respondent, Sea-Land, the purchaser in foreclosure, presumes and proposes to enlarge on the foreclosure-purchase so as to include certain "Rights of Ownership," and to assert defenses in behalf of the Vessel.

BUT: This cannot be legal and proper as Sea-Land's predecessor-assignor, Continental Illinois National Bank of Chicago (CINB), at CR 19 filed on October 21, 1987, filed a "confession of Judgment" which reads, in pertinent part:

4. CINB as Shipowner Trustee specifically waives any and all right it may have to claim restitution of the Vessel and to defend this action on the Vessel's behalf, for adequate consideration.

(MONEY)

This "Confession of Judgment" was executed and filed prior to the transmitting to Sea-land of "all rights of ownership," and was transmitted without the right to claim restitution or to defend actions on the Vessel's behalf (December 16, 1987).

The former Owner/Bareboat charterer, (U.S.L.) United States Lines, also executed and filed a Confession of Judgment and rejected the Bareboat charter in November 1987 for adequate consideration, and became a non-owner.

I was employed (by U.S.L.) on the vessel as Steady Boatswain between January 1981 and December 1982.

In June 1982 (June 12, 1982) I was ordered by my superior (Chief Officer) to stow all flammables in the "Certified Paint Locker" (some 1,200 gallons).

In lifting a can of paint to the 3rd level (3 high) I suffered excruciating lower back pain, which persists. (Failure of the

company to provide adequate certified paint locker area is unseaworthiness.)

IN THE COURSE OF RETROFIT, the Bareboat Charterer caused increased strengthening of the Vessel to be done, THUS permitting containers (large metal boxes) to be carried five (5) high. (Previously containers were not carried over 3 high.)

CLOSED SHIP: The Vessel was a closed ship ventilation wise. (All doors spring shut, and port holes could not be opened.)

For the most part, stacking containers 5 high is insignificant.

However, stacking containers 5 high in front of the only ventilation (intake and exhaust, in the same place) is, I believe, willful unseaworthiness.

I left the Vessel on December 31, 1982 NOT FIT FOR DUTY, exhibiting accelerated manifestations of exposure to environmental toxins, requiring surgery. (The said Vessel's ventilation is also proximate to other high sulfur combustion exhaust.)

Argument Importance of Case

This case is of paramount importance to a large and vital group, who as creditors, are most often called upon to support/ sponsor admiralty and maritime undertakings.

These creditors are variously identified as Master and Crew, Vendors, Salvors, Mortgagors, Fuel Supply, and every manner and sort of ship repair and supply, to expedite dispatch of the Vessel's purpose and, perhaps, to make the voyage possible.

All too frequently these mostly "UNSECURED CREDITORS" must come before the *BAR* claim in hand and beseech a Court to compel payment, often via admiralty foreclosure.

And we thus have the ideal setting of the Vessel's proceeds of sale resting snugly in the Court's coffers, to be disbursed with a certain priority of liens, in their certain amounts, so the story goes.

Real Life Sequence
The Departure from the Rules

This case is conspicuous, in that it is a clear example of the Litigant being far better rewarded if (s)he has the Judge on his side rather than the Law.

For as in this case, we have well connected lawyers, influential enough to succeed the U.S. Attorney as overseer of distribution of the proceeds of sale.

Bad enough, it was that the District Court should permit the U.S. Attorney as an interested party to preside over paying of the U.S.A. lessor priority mortgage.

But as soon as the mortgage was paid, U.S. Attorney steps aside in favor of NON-PARTY Sea-Land who proceeded not to effect payment of claims, but to avoid payment of claims and succeed to the benefits of avoided claims.

Every bona fide intervenor was subjected to avoidance of their claim, by Sea-Land's lawyers who themselves were improper party(s) in the action (see Conf. of Judgment).

These lawyers have a vicious way of making remnant(s) occur as is evidenced *by the nine expensive trips* I made to California to attend 'Status Conference' in this Action, prior to the "Transfer to S.D.N.Y., for the *convenience of witnesses*, and in the *interest of justice*. (sic)

As and for: INSURORS

I maintain the "so-called" Insurors entry in this Action 31 months after the Bankruptcy petition was filed, and 22-23 months after my first claim was filed *in rem* to undertake transfer, is a vicious form of champerty, and deprives me of my right to a *default judgment* as the sole bona fide claimant to the remaining *res*, illegally disbursed, to Sea-Land an amount over 5 million, in 1989-1990, pursuant to Orders CR 245, 272 and CR 293.

Interestingly, Sea-Land also had a "Friend" in the Ninth Circuit who observed:

WE NOTE THAT Mackensworth HAS NOT BEEN HARMED BY THE DISTRICT COURT'S PROCEEDING. (Ha Ha).

The pertinent Order (*C.R. 230*) "Titled: ORDER DENYING MOTION TO AMEND AND GRANTING MOTION TO TRANSFER, clearly states: (page 4:28 *et seq.*):

. . . Such letter of undertaking shall serve as the substitute security for the *res* in this action, i.e., the Vessel's proceeds of sale," pursuant to Rule E (5)(a) of the Supplemental Rules of Certain Admiralty and Maritime Claims."

3. This Order is *"not interlocutory."* "IT" is part of the body of the "Main Order" re transfer which I read as applying to all my filed claims as listed on the Docket, IN THE FINAL PARAGRAPH of Order Number C.R. 230. We find: (CR 230, page 5:14)

(2) Mackensworth's complaint . . . is transferred to the district court (SDNY) . . . contingent upon the posting of an appropriate letter of undertaking.

Perversion of Joinder

The Asst. U.S. Attorney et al. have no defense to my joinder claim, but they can probably assert a defense to a motion to

amend—which I have not made—*IF they can convert JOINDER to AMEND by some manner of perversion.*

Alleging Joinder Time Barred

The rights of parties or entities properly intervened; TO *amend or claim by joinder,* are not affected by the Default Order.

Sea-Land ALLEGES, THIS CLAIM IS TIME BARRED, by 46 U.S.C. 763(a):

763 a. Limitations

Unless otherwise specified by law, a suit for recovery of damages for personal injury or death, or both, arising out of maritime tort, shall not be maintained unless commenced within three years from the date the cause of action accrued.

46 U.S.C. 763 a., is not applicable in this civil action as "suit," WAS COMMENCED ON JUNE 12, 1984, consistent with the three year 'Statute of Limitations' of 46 U.S.C. 688, the Jones act, AND 763 a., does not interfere with other law (see first sentence) in the internal affairs of an action, as long as that action was commenced within three years.

Notwithstanding any part of 763(a), *the joinder Rule 18(a),* is not nullified, abrogated nor repealed thereby, I maintain the first sentence of 763(a), "UNLESS OTHERWISE SPECIFIED BY LAW" *clearly skirts and leaves intact the Joinder Rule,* and 763(a) was *never intended to interfere therewith in timely filed cases, and it does not.*

Joinder not Vulnerable to Dismissal

The opposition does not challenge the fiber of the joinder rule by or of itself.

What movant et al., attempts to do in this Court is pervert the clear and plain language of Fed. Rule Civ. Proc. 18(a), into a motion to amend, more to his liking.

I maintain Rule 18(a) joinder et seq., does not need or allow for a hearing judge to invoke the so-called 'Discretion of the Court,' nor does it permit it, my joinder claim, to be perverted, to a motion to amend, directly contrary to Fed. Rule Civ. Proc. 21, which does not permit dismissal of joinder, even if misjoinder is evident.

(b) I maintain that hearing my joinder, as a motion to amend in effect and in fact* *constitutes an illegal dismissal* of the joinder, and I object.

(c) *NOTES OF ADVISORY COMMITTEE ON 1966 AMENDMENTS* (Source: Fed. Procedure Rules Service, 1985 Ed., Pg. 109, Rule 18(a))

. . . . . .*Accordingly rule 18(a) has permitted a party to plead multiple claims of all types against an opposing party, subject to the Court's power to direct an appropriate procedure for trying the claims.*

See F.R.C.P. 42(b), 20(b), 21

(Rule 20(b) and 42(b) refer basically to separate trials, Rule 21, deals with misjoinder and non-joinder.)

a. *I feel I have made my case that, joinder once filed cannot be dismissed by/in discretion of the court. See pg. 34.

(This claim was never futile.)

The Current State of The Law

Remains the same: i.e. a minor amendment and renumbering post repeal, has not significantly or remarkably rotated the scheme of priorities.

46 USC 953 is *now* 46 USC 31326

Reads: EFFECTIVE DATE

Section effective Jan. 1, 1989, with certain exceptions and qualifications, "and not to affect any civil action filed before that date. . . (.)

In A Word

Respondent Sea-Land still holds over 1.5 million as remnants.

Proper Bond/Surety (of $1,088,000.) remain to be posted in Transferee District.

Ninth Circuit Error in Light of The Law and The District Court Order

Pursuant to *Rule E(5)(a) and (b) Supp. R., Bond/Security shall be posted "Conditioned to answer the Judgment of the Court or of any Appellate Court."*

NO MATTER WHAT THE COURT BELOW RULED ON IT AS, HE CANNOT "UN FILE" IT, it is entitled to be appealed in its *original form*, AND THEREFORE Bond/Security should be Ordered in the full amount of my claim(s), double the amount of the claim(s), $1,088,000.00 Rule E(5)(b).

As long as the Ninth Circuit has taken the issue "Bond Security," the Mandate should direct full compliance with the Statutory Requirement, for any and all claims *however filed*, so long as that they are on the record in/on the docket they are *in rem* against the proceeds of sale,

AND that does not excuse the Appellate Court from mandating Bond/Security be posted on the original claim(s) for probable appeal!

Proper security and posting of proper bond must necessarily come from within the foreclosure action, "As My Claim is There" against the *res* or substitute *res* and not against any "Non-Party" insurers who if permitted to post security (in the Transferee District) would surely want to, and might be entitled to defend it (the security).

Conclusion

And: preposterously (Ninth Circuit) went on to believe the wrong Party/Entity, Ninth Circuit said:

. . . Sea-Land posted a substitute security in the full amount of the claim. . . asserted.

I can assure the Court, if the proper Bond/Surety in the full amount were posted, I WOULD NOT BE HERE.

My *last employment* was aboard the defendant Vessel in December 1982.

Respectfully submitted

By: Richard J. Mackensworth
Petitioner Pro Se
3515 Leverich St.
Jackson Heights, NY 11372
(718) 429-5886

APPENDIX I

Entered on Docket 8-1-88
Docket No. 157

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

United States of America,

Plaintiff,

v.

S.S. American Merchant (Official No. 547228), her engines, boilers, apparel, ...etc., in rem, and Continental III. Natl. Bank, ...Solely as Owner Trustee for Great Amer. Ins. Co., Provident Bank, & HFC Leasing, Inc., in personam,	)	Civil No. C87-4888 SC
Defendants.	)	Order to Disburse Excess Proceeds of Sale
And Claims in Intervention	)	

WHEREFORE, the defendant vessel S.S. AMERICAN MERCHANT (hereinafter "the vessel") having been sold at admiralty sale for $5,000,000 by the United States Marshall pursuant to this Court's Order for Interlocutory Sale; and the sale having

been confirmed by Order of this Court on November 20, 1987; and the principal proceeds of sale and accrued interest thereon having been maintained in the Registry of the Court by the Clerk in the form of 90 day Certificates of Deposit; and the total of all alleged maritime lien claims asserted in this action by all parties other than the United States as mortgagee totalling $891,094.45; and the first preferred mortgage lien (not including the mortgage lien for attorneys' fees and expenses arising under the mortgage) of plaintiff, United States, being $3,829,950.32; and in personam defendant Continental Illinois National Bank and Trust Company of Chicago, Trustee, having filed a "Claim, Answer, and Confession of Judgment" on its own behalf as Owner Trustee and on behalf of defendant vessel; and

United States Lines, the vessel's former bareboat charterer and owner pro hac vice, having filed a "Claim, Answer, and Confession of Judgment" on behalf of the defendant vessel; and the United States therefore being entitled to a sufficient portion of the surplus vessel sale proceeds (after payment, if any, of any and all other alleged maritime liens of plaintiffs-in-intervention herein) in satisfaction of its preferred ship mortgage lien; and

WHEREFORE, the United States of America, having moved for disbursement of $3,829,950.32 of the principal proceeds of sale as partial payment of its first preferred ship mortgage lien (not including its mortgage lien for attorney's fees and expenses); and the Court having determined that disbursement of the afore-

said amount would leave sufficient monies (the "reserve") in the registry of the Court to pay the full amount of the claims of each and every plaintiff-in-intervention even in the event that each and every said plaintiff-in-intervention is later able to prove the validity and priority of its alleged maritime lien; and the Court, having considered all papers submitted with respect to the Motion, and, further, having held a hearing on the Motion and provided opportunity for argument by counsel for the various parties; and the Court having considered all arguments offered with respect to the Motion, and good cause appearing therefor, it is

ORDERED that the Motion of the United States be, and the same is, hereby granted; and it is further

ORDERED that upon the next maturity date of the 90 day Certificates of Deposit in which the sale proceeds are invested, the Clerk of the Court immediately shall disburse to plaintiff, United States of America, the sum of $3,829,950.32, which sum shall constitute partial payment of the first preferred ship mortgage lien of the United States against the defendant vessel; and it is further

ORDERED that this Order does not establish any right or entitlement by any party to the proceeds of sale, including principal and interest, remaining in the Registry of the Court after disbursement of the aforesaid sum to the United States, this Order instead being without prejudice to the rights, if any, of any and all parties to challenge the validity, priority, and amounts of the alleged

maritime liens asserted by all other parties in this action, the validity, priority, and amounts of all such alleged maritime liens remaining to be determined by the Court pursuant to further order; and it is further

ORDERED that this Order is without prejudice to the rights of the United States to seek, collect, and enforce any deficiency judgment against the in personam defendant herein; and it is further

ORDERED that this Order is without prejudice to the rights of the United States to assert and collect such other monies as are owed for attorneys' fees and expenses as provided for pursuant to the United States' First Preferred Mortgage herein; and it is further

ORDERED that this Order is without prejudice to the rights of the United

States, if any, to seek, collect, and enforce any deficiency judgment against the former bareboat charterer of the vessel.

IT IS SO ORDERED this 29th day of July, 1988, at San Francisco, California.

Samuel Conti
UNITED STATES DISTRICT JUDGE

PRESENTED BY:

JOHN R. BOLTON
Assistant Attorney General
JOSEPH P. RUSSONIELLO
United States Attorney
PHILIP A. BERNS
Attorney in Charge, WCO
Torts Branch, Civil Division

JOHN G. HARRISON, Trial Attorney
Torts Branch, Civil Division
U.S. Department of Justice

Attorneys for Plaintiff
United States of America

APPENDIX II

Entered on Docket 8-12-88
Docket No. 165

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, Plaintiff, -vs.- S.S. AMERICAN MERCHANT, et al., Defendants.	No. C87-4888 SC ORDER RE MOTION FOR INJUNCTIVE RELIEF

This is an action in rem to foreclose a preferred ship mortgage pursuant to 46 U.S.C. § 951. This action was commenced by plaintiff United States of America ("U.S.") in September 1987. The defendant vessel was seized by the United States Marshal and sold pursuant to an interlocutory court order. On November 23, 1987, the sale was confirmed by order of the court. The proceeds from the sale of defendant vessel

has been deposited in the registry of the court and court maintains jurisdiction over the funds.

This matter is currently before the court on the motion of pro se plaintiff-in-intervention Richard J. Mackensworth ("Mackensworth") for injunctive relief. Mackensworth is asserting a lien against the S.S. American Merchant. Mackensworth claims the lien is worth $44,000.00. See Document entitled "Status of Lien: Perfected and Recorded," Docket No. 25, filed with this court on November 3, 1987. The lien has its genesis in an action commenced by Mackensworth against the United States Lines, Inc. ("U.S. Lines"), in the United States District Court for the District of New Jersey (Civil No. 84-2294). U.S. Lines was the former owner of the S.S. American Mer-

chant, and filed for bankruptcy in November 1986. Prior to the bankruptcy filing, U.S. Lines was actively defending that action. That action, one for alleged personal injuries received by Mackensworth while on board the S.S. American Merchant in the Pacific Ocean, was automatically stayed by the filing of the bankruptcy petition.

Mackensworth is appearing in this matter pro se. His motion papers are difficult to understand. Mackensworth seeks to enjoin certain entities from defending against claims in this action. Mackensworth argues that these entities have waived their right to defend against his claim and that they have failed to secure court approval for their appearances in this action.

Under Fed. R. Civ. P. 65, a party is

entitled to injunctive relief if it demonstrates:

> (1) a combination of probable success on the merits and the possibility of irreparable injury or (2) that serious questions are raised and the balance of hardships tips sharply in its favor.

Zepeda v. United States Immigration and Naturalization Service, 753 F.2d 719, 727 (9th Cir. 1983); Los Angeles Memorial Coliseum Commission v. National Football League, 634 F.2d 1197, 1200 (9th Cir. 1980).

Mackensworth has made no showing of irreparable injury. As a personal injury claimant, his lien will has one of the highest priorities. His lien has been adequately protected by order of the court; a more than adequate reserve is being maintained in the court's registry. Mackensworth has made no showing as to probable success on the merits. Further-

more, Mackensworth has failed to post any security as required by Fed. R. Civ. P. 65(c).

Mackensworth's legal arguments are without merit. The only waiver of rights that has occurred in this action is with respect to the claims arising out of the mortgage held by the U.S. There has been no waiver of any rights with respect to the various parties' defense against any other claims. There is no defect in any of the parties' appearances.

For all these reasons, the court denies Mackensworth's motion for injunctive relief.

Date: August 12, 1988

Samuel Conti
United States District Court

APPENDIX III

Entered on Docket 7-31-89
Docket No. 230

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, Plaintiff, and RICHARD J. MACKENSWORTH, Plaintiff in Intervention v. S.S. AMERICAN MERCHANT, et al., Defendants.	No. C87-4888 SC Order Denying Motion to Amend and Granting Motion to Transfer

This action comes before the court on two matters: plaintiff-in-intervention Richard J. Mackensworth ("Mackensworth"), appearing pro se, seeks to "join" a claim to his original complaint, pursuant to Fed. R. Civ. P. 18(a); and claimants Sea-Land Service, Inc. and United States Lines, Inc. ("Claimants")

seek to transfer Mackensworth's intervention action in rem to the United States District Court for either the District of New Jersey or the Southern District of New York. Such transfer would be contingent upon the posting into the Registry of this Court a letter of undertaking by U.S. Lines' protection and indemnity underwriters, The United Kingdom Mutual Steam Ship Mutual Assurance Association (Bermuda) Limited (the "U.K. P&I Club"). Such letter of undertaking would serve as substitute security for the res in this action, i.e., the vessel's proceeds of sale, pursuant to Rule E(5)(a) of the Supplemental Rules for Certain Admiralty and Maritime Claims.

1. Mackensworth's Motion

Mackensworth seeks to "join" a claim for respiratory system ailments allegedly

caused by environmental toxics inhaled while he worked on the S.S. American Merchant. Mackensworth claims that his alleged respiratory injury manifested itself by December 31, 1982, "more than six years ago." Mackensworth's Claim by Joinder, at 6:3-5.

The Court shall treat Mackensworth's "joinder" motion as a motion to amend, pursuant to Fed. R. Civ. P. 15(a). Rule 18(a) deals only with pleading requirements, and does not treat substantively whether a party may amend his original complaint to include new claims. See Rule 18 Advisory Committee notes.

The Court finds that leave to amend is not warranted here, because Mackensworth's proposed amendment would be futile. See California Architectural Building Products, Inc. v. Franciscan

Ceramics, Inc., 818 F.2d 1466 (9th Cir. 1987); Sackett v. Beaman, 399 F.2d 884 (9th Cir. 1968) (futility is adequate grounds upon which to deny a motion to amend). Mackensworth's proposed amendment, a claim alleging respiratory system injuries caused by environmental toxics aboard the S.S. American Merchant, is a claim which Mackensworth admits manifested itself by December 31, 1982, "more than six years ago." Mackensworth's Claim by Joinder, at 6:3-5. This claim is barred on its face by the applicable three year statute of limitations found in 46 U.S.C. §763(a).

This proposed amendment would not "relate back" to the original complaint, as it does not arise out of the same "conduct, transaction, or occurrence set forth in the original pleading" as re-

quired by Fed. R. Civ. P. 15(c). Mackensworth's original complaint alleges injuries from one discreet incident--back injuries which allegedly stem from his loading of paint cans on the vessel on June 13, 1981. Therefore, as the proposed amendment would be barred by the statute of limitations, the Court declines to grant Mackensworth leave to amend his complaint to add this new claim.

2. U.S. Lines/Sea-Lands Service Motion to Transfer

Claimants seek to transfer Mackensworth's complaint in intervention to the United States District Court for the District of New Jersey, or, in the alternative, to the Southern District of New York, pursuant to 28 U.S.C. §1404(a). Mackensworth does not object to a trans-

fer to the Southern District of New York.

The Court finds that several factors counsel transfer of this matter to the Southern District of New York. Mackensworth resides in New York, and U.S. Lines' files, trial exhibits, and its corporate counsel are all located in New York. Moreover, the witnesses which U.S. Lines intends to use reside in New York. The Southern District of New York is clearly a more convenient forum for the parties and witnesses to this action.

This lawsuit was originally brought in the Northern District of California simply because the subject vessel was at that time in this district. The vessel has since been sold, with the proceeds of sale deposited in the Court's Registry. The Court finds that good cause exists to transfer this in rem claim. See Conti-

nental Grain Company v. Barge FBL-585, 364 U.S. 19 (1960); In re International Marine Towing, Inc., 617 F.2d 362 (5th Cir. 1980).

The Court orders that this transfer be contingent upon the posting into the Registry of this Court a letter of undertaking by U.S. Lines' protection and indemnity underwriters U.K. P&I Club, which letter of undertaking shall be subject to the approval of this Court and shall be in substantially the form of that suggested by Claimants. See Exhibit A, Lambert Declaration in Support of Joint Motion. Such letter of undertaking shall serve as the substitute security for the res in this action, i.e., the vessel's proceeds of sale, pursuant to Rule E(5)(a) of the Supplemental Rules for Certain Admiralty and Maritime

Claims. The posting of this letter of undertaking shall coincide with the next roll-over date of the certificates of deposit held in the Registry of this Court. At that time, in exchange for said letter of undertaking being posted, $18,000 of the vessel sale proceeds shall be paid to Transport Mutual Services, Inc., as agents on behalf of the U.K. P&I Club.

In accordance with the foregoing, IT IS HEREBY ORDERED that:

(1) Mackensworth's motion to amend is denied; and

(2) Mackensworth's complaint-in-intervention is transferred to the district court for the Southern District of New York, contingent upon the posting of an appropriate letter of undertaking.

SO ORDERED.

Dated: July 31, 1989

Sameul Conti

United States District Judge

APPENDIX IV

Entered on Docket 8-11-89
Docket No. 245

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, Plaintiff, and RICHARD J. MACKENSWORTH, Plaintiff in Intervention v. S.S. AMERICAN MERCHANT (Official No. 547288)..., ...in rem, et al., Defendants.	No. C87-4888 SC (Proposed) Order Concerning Transfer of Action

WHEREAS Claimants Sea-Land Service, Inc. and United States Lines, Inc., debtor and debtor-in-possession, have caused an appropriate Letter of Undertaking to be posted into the Registry of this Court, in compliance with this Court's July 31, 1989 Order on their Joint Motion, it is therefore

ORDERED, that the Clerk of this Court is instructed to pay to Transport Mutual Services, Inc., as correspondent for the United Kingdom Mutual Steam Ship Assurance Association (Bermuda) Limited, the sum of $18,000 from the Proceeds of the judicial sale ("Proceeds") of the defendant vessel S.S. AMERICAN MERCHANT on the August 14, 1989 roll-over date of the Certificates of Deposit in the Registry of this Court containing said Proceeds; and it is further

ORDERED, that in connection herewith, the Clerk is instructed to notify Counsel submitting this Order when the check with said $18,000 payment is available, so he may promptly collect the same for transmission to Transport Mutual Services, Inc.; and it is therefore further

ORDERED, that the contingency in this Court's July 31, 1989 Order is now held satisfied, and the Clerk of this Court is instructed to effect the transfer of intervenor Richard Mackensworth's action to the Southern District of New York forthwith.

Dated: August 11, 1989

Samuel Conti

JUDGE OF THE UNITED STATES
DISTRICT COURT

Submitted By:

GRAHAM & JAMES
JOHN A. EDGINTON
RUPERT P. HANSEN
Telephone: (415) 954-0361

By _____
Rupert P. Hansen
Attorneys for Claimant
Sea-Land Service, Inc.

APPENDIX V

Entered on Docket 12-22-89
Docket No. 271

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

United States of America, Plaintiff, v. S.S. AMERICAN MERCHANT (Official No. 547288), (...)(...) in rem et al., Defendants.	No. C87-4888 SC Order Concerning Proceeds of Sale

WHEREAS, the defendant vessel S.S. AMERICAN MERCHANT [hereinabove the "vessel"] having been sold at admiralty sale for $5,000,000 by the United States Marshal pursuant to this Court's Order for Interlocutory Sale; and the sale having been confirmed by Order of this Court on November 20, 1987; and the principal proceeds of sale and accrued interest thereon [hereinafter the "Proceeds"] having

been maintained in the Registry of the Court by the Clerk in the form of Ninety (90) day Certificates of Deposit pursuant to said Interlocutory Order of Sale; and in thirty (30) day Certificates of Deposit pursuant to this Court's Order dated May 15, 1989; and in seven (7) day Certificates of Deposit pursuant to this Court's Order dated November 9, 1989; and the current set of said Certificates maturing on or about December 26, 1989; and

WHEREAS, it appears that Application has been made for approval of partial distribution of all but $65,000 of the Proceeds to Claimant Sea-Land Service, Inc., as assignee of the rights of United States Line, Inc. (debtor and debtor-in-possession), and sole claimant to the remnants of the Proceeds, and that

having said sum from the Proceeds immediately available in the Registry of the Court will expedite said partial distribution, if approved; and that re-investing said remaining $65,000 of the Proceeds in seven (7) day Certificates of Deposit in the Court's Registry more will promote rapid conclusion of the remaining claims as settlements are reached and final distribution is applied for; and

WHEREAS, Sea-Land Service, Inc., having demonstrated good cause in its ex parte Application for the investment of all but $65,000 of the Proceeds in a savings account in the Court's Registry, and for re-investment of said remaining $65,000 of the Proceeds in seven (7) day Certificates of Deposit, and having demonstrated no prejudice will occur to any claimant by the granting of this ex parte

Application; it is therefore

ORDERED that the ex parte Application of Sea-Land Service, Inc. be, and the same is, hereby granted; and it is further

ORDERED that upon the December 26, 1989 maturity date of the Certificates of Deposit in which the Proceeds are currently invested, the Clerk of the Court is instructed to immediately invest all but $65,000 of said Proceeds in a savings account in the Court's Registry, and to re-invest said remaining $65,000 of the Proceeds in seven (7) day Certificates of Deposit.

IT IS SO ORDERED this 22nd day of December, 1989, at San Francisco, California.

Theldon Henderson

UNITED STATES DISTRICT JUDGE

PRESENTED BY:

GRAHAM & JAMES
JOHN A. EDGINTON
RUPERT P. HANSEN

_____

Rupert P. Hansen
Attorneys for Claimant
Sea-Land Service, Inc.

APPENDIX VI

Entered on Docket 12-26-89
Docket No. 272

Graham James
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Rupert P. Hanson
One Maritime Plaza
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(415) 954-0200

Attorneys for Claimant
SEA-LAND SERVICE, INC.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

United States of America, Plaintiff, v. S.S. American Merchant (Official No. 547288) (...)(...) in rem et al., Defendants.	No. C87-4888 SC (Proposed) Order as to Application of Claimant Sea-Land Services, Inc., for Partial Disbursement of Sale Proceeds

WHEREAS, after notice to all interested parties in this action, no written objection was timely filed to Claimant SEA-LAND SERVICE, INC.'s ("Sea-Land")

Application for Order for Partial Disbursement of Sale Proceeds, and good cause appearing in said Application; it is therefore hereby:

ORDERED that Claimant Sea-Land's Application is granted and that upon the next maturity date of the certificates of deposit bearing the sale proceeds of the defendant vessel, S.S. AMERICAN MERCHANT, in rem ("Proceeds"), or sooner if sufficient Proceeds are in a savings account in the Court's Registry, the Clerk of the Court is directed to forthwith pay to Sea-Land all but $65,000 of the Proceeds, in partial satisfaction of Sea-Land's claim to the remnants of said Proceeds. The Clerk is further directed to notify Rupert P. Hansen, Esq., counsel for Sea-Land when said funds will be available.

Dated: December 26 , 1989.

Theldon Henderson

UNITED STATES DISTRICT JUDGE

APPENDIX VII

Entered on Docket 8-1-90
Docket No. 293

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SEA-LAND SERVICE, Inc.

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

United States of America, Plaintiff, v. S.S. American Merchant (Official No. 547288) (...)(...) in rem et al., Defendants.	No. C87 4888 SC Order for Final Distribution of the Entire Remnants of Proceeds of Sale to Claimant Sea-Land Service, Inc.

WHEREAS, after notice to all parties in this matter, no written objection was timely filed to Claimant SEA-LAND SERVICE, INC.'s ("Sea-Land") Application for

Order for Final Distribution of the remnants of the Sale Proceeds of sale of the defendant vessel S.S. AMERICAN MERCHANT, in rem (the "Proceeds"), and good cause appearing in said Application; it is therefore hereby:

ORDERED that Claimant Sea-Land's Application for Final Distribution to it of the entire remnants of the vessel's Proceeds is granted, in full satisfaction of Claimant Sea-Land's claim against said Proceeds; and it is further

ORDERED that upon the next maturity date of the certificates of deposit bearing the vessel's proceeds, the Clerk of the Court is directed to forthwith pay Claimant Sea-Land the entire remnants of the vessel's proceeds in the Court's registry. The Clerk is further directed to notify Rupert P. Hansen, Esq., counsel

for Claimant Sea-Land, when the funds will be available.

Dated: August 1 , 1990

Samuel Conti
UNITED STATES DISTRICT JUDGE

APPENDIX VIII

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, SEA-LAND SERVICE, INC., Claimant-Appellee, vs. S.S. AMERICAN MERCHANT, (Official No. 457288), her engines, boilers, tackle, apparel, appurtenances, furnishings, etc., in rem, etc. Defendant, vs. RICHARD J. MACKENSWORTH, Plaintiff-Intervenor-Appellant	No. 90-16412 D.C. No. CV-87-04888-SC MEMORANDUM* ENTERED 2-27-92 * REHEARING DENIED 4-1-92 *

Appeal from the United States District Court, Northern District of California Samuel Conti, District Judge, Presiding

*This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Circuit Rule 36-3.

Argued and Submitted January 14, 1992
San Francisco, California

Before: GOODWIN, FLETCHER, and BRUNETTI, Circuit Judges.

OVERVIEW

Richard Mackensworth, intervenor-appellant, appeals pro se the district court's distribution of the vessel sale proceeds in an action by the United States to foreclose a first preferred ship mortgage on the vessel. Mackensworth's intervention arose from alleged maritime personal injuries. He also appeals the transfer of his personal injury action to the Southern District of New York and various interlocutory orders made during distribution of the vessel's proceeds.

FACTS AND PROCEDURAL HISTORY

On June 12, 1984, Appellant Mackens-

worth filed a personal injury claim against United States Lines (USL),[1/] the charterer of the S.S. American Merchant (Vessel) and employer of Mackensworth, in personam, and against the Vessel, in rem, in the District of New Jersey. When USL filed a Chapter 11 bankruptcy petition on November 24, 1986, Mackensworth's claim was stayed.

On September 23, 1987, the United States subsequently brought an admiralty action in rem in the United States District Court for the Northern District of California to foreclose a First Preferred Ship Mortgage it held in the Vessel. The

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1/ The Vessel was under a "bareboat" charter, or lease, to USL who thus acted as the owner "pro hac vice." Legal title to the vessel was held by Continental Illinois National Bank and Trust Co. of Chicago as trustee for the owners, HFC Leasing Inc., Great American Insurance Co., and the Provident Bank. Prior to the commencement of the United States' mortgage foreclosure action, Sea-Land Services, Inc. (Sea-Land) had been granted the right to purchase the Vessel. It was assigned all of the ownership rights, including any and all of the ultimate recovery of the judicial sale of the Vessel.

Vessel thereafter was arrested by the United States Marshal, pursuant to Rule C of the Supplemental Rules for Certain Admiralty and Maritime Claims of the Federal Rules of Civil Procedure, and sold. The proceeds of the sale were then deposited in the district court's registry as a substitute res.

Mackensworth, as well as the other maritime lien claimants, ultimately was granted relief from other bankruptcy stay and permitted to intervene in the admiralty action in the District Court of Northern California by filing an action against the Vessel, in rem. Mackensworth intervened on December 17, 1987.

On February 22, 1988, after previously having given notice of its intent to do so, the district court entered a default against all persons claiming an

interest in the Vessel who failed to file a complaint in intervention against the Vessel. The total claims against the Vessel filed by all intervenors amounted to $891,094.45 and the proceeds from the Vessel's sale amounted to 5 million, leabing an excess of $3,829,050.32. Based on the fact that a surplus existed for the intervenors, the district court disbursed approximately 3.8 million dollars to the United States on July 29, 1988 in partial satisfaction of its claim. On June 8, 1990, the district court ordered entry of final judgment in favor of the United States pursuant to Rule 54(b) of the Federal Rules of Civil Procedure and ordered a disbursement to the United States in final satisfaction of its remaining claims not resolved by the first disbursement.

Finally, Sea-Land moved for the final distribution of the entire remnants of the last of the proceeds of the Vessel because no claimants to the Vessel remained in the district court. On August 11, 1989, Mackensworth's claim had been transferred to the Southern District of New York after Sea-Land posted a substitute security[2/] covering the full amount of the claim Mackensworth had asserted. The remaining intervenors' claims had been satisfied from the Vessel's proceeds. On July 16, 1990, the court entered its Final Order for Distribution on

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2/ Letters of Undertaking traditionally have been used in admiralty as a means of securing release from arrest of a vessel or its proceeds of sale. See Alyeska Pipeline Serv. Co. v. Vessel Bay Bridge, 703 F.2d 381, 384 (9th Cir. 1983), cert. dismissed by, 467 U.S. 1247 (1984); J. K. Welding Co. v. Gotham Marine Corp., 47 F.2d 332 (S.D.N.Y. 1931). The stipulation for value or other security is substituted for the vessel or vessel's proceeds and becomes the res subject to the court's jurisdiction. Fed. R. Civ. P. E(5) (Supplemental Rules for Admiralty and Maritime Claims).

August 1, 1990, and ordered the entire remaining sale proceeds disbursed to Sea-Land. None of the res remains in the registry of the Northern District of California.

Mackensworth filed this appeal on October 1, 1990.

ANALYSIS

I. Standard of Review

This court exercises its independent judgment with respect to questions of appellate jurisdiction, Pride Shipping Corp. v. Tafu Lumber Co., 898 F.2d 1404, 1406 (9th Cir. 1990), and must dismiss the suit whenever it lacks jurisdiction. Billingsley v. Commissioner, 868 F.2d 1081 (9th Cir. 1989).

II. Jurisdiction

It is well settled that in rem

jursidiction exists only where the subject matter of the action, or an appropriate substitute thereof, is within the jurisdiction of the court in which the action lies. American Bank of Wage Claims v. Registry of the Dist. Court of Guam, 431 F.2d 1215, 1218 (9th Cir. 1970). This principle applies in admiralty actions. Id. The release or complete disbursal of the vessel or substitute res destroys subject matter jurisdiction and renders moot any appeal concerning the res. Id.; Alyeska Pipeline, 703 F.2d at 384; Pride Shipping, 898 F.2d at 1408; Stevedoring Servs. of Am. v. Ancora Transport, N.V., 941 F.2d 1378, 1382 (9th Cir. 1991) (court lost jurisdiction over a Rule B maritime attachment when the plaintiff failed to obtain a stay of execution of the judgment be-

fore the district court properly released the security).

In this case, the proceeds of the Vessel, deposited in the district court's registry, acted as the substitute res. See American Bank, 431 F.2d at 1218. When the proceeds were distributed to the various parties, leaving nothing in the district court's registry, the in rem jurisdiction was destroyed. Mackensworth never attempted to stay the distribution of any of the proceeds. Although he did make informal oral objections to the disbursements made to the United States during two separate hearings, he never moved for or even mentioned a stay. Although he made one attempt at appealing the July 29, 1988 interlocutory disbursement order to the United States, he voluntarily dismissed

the appeal when the district court refused to certify the appeal pursuant to 28 U.S.C. § 1292.

Under an exception to the prevailing rule, the release or disbursement of the res will not terminate jurisdiction if the res is released accidentally, fraudulently, or improperly. Pride Shipping, 898 F.2d at 1409; Farwest Steel Corp. v. Barge Sea-Span 241, 769 F.2d 620, 621 (9th Cir. 1985); American Bank, 431 F.2d at 1219. Stevedoring, 941 F.2d at 1382. It is clear that the district court did not release the res accidentally or fraudulently. All disbursements were made pursuant to the court's orders. It is also clear that the district court did not release the res improperly. As discussed above, the court disbursed the funds pursuant to the legitimate, settled

claims of the United States and other maritime lienors. Its final disbursement to Sea-Land was made after it determined it no longer had any claimants before it. See Stock West, Inc. v. Confederated Tribes of the Colville Reservation, 873 F.2d 1221, 1225 (9th Cir. 1989) (clearly erroneous standard of review applies to factual findings on jurisdictional issues). Thus we cannot rely on the exception to support our jurisdiction and must dismiss this appeal.[3/] We note that Mackensworth has not been harmed by the district court's

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3/ Mackensworth's suggestion that we "recall" the disbursements made by the district court and "make the res reappear" already has been rejected emphatically in our circuit. See American Bank, 431 F.2d at 1219. The district court ordered disbursements of the res to eleven parties over a two-year period. This court would be forced to trace, identify, recover, and then redistribute the disbursed funds--a time-consuming endeavor, and one brought on by Mackensworth's failure to seek a stay of any of the disbursements.

proceedings. If he should prevail fully on his personal injury claim in the District Court of New York, there is an adequate monetary fund from which to satisfy his injury.

III. Remaining Interlocutory Orders

We note that even if we had jurisdiction over this appeal, we would not be able to review the district court's transfer of Mackensworth's claim to the Southern District of New York. The decision in the transferee court is not yet final. The rule in this circuit is clear: transfer orders under 28 U.S.C. § 1404(a) are not appealable until final judgment has been rendered in the transferee district. In Re Kemble, 776 F.2d 802, 806 (9th Cir. 1985); Kasey v. Molybdenum, 408 F.2d 18 (9th Cir. 1969). The

proper avenue for review of transfer orders under § 1404(a) is by a writ of mandamus. American Fidelity Fire Ins. v. United States Dist. Court, 538 F.2d 1371, 1374 (9th Cir. 1976). Nor will we cosntrue this appeal as a writ of mandamus. Mackensworth already has sought a writ of mandamus regarding this transfer order which we denied as being without error in an Order filed April 3, 1990.

Likewise, we cannot review the district court's denial of Mackensworth's Motion to Enjoin USL and Sea-Land from defending against his complaint in intervention, filed on November 7, 1988, or his Motion to Amend a Complaint, submitted as a Motion to Join a Complaint, filed on July 10, 1989. The district court's denials of each motion are interlocutory and therefore not appealable.

28 U.S.C. § 1292.

DISMISSED.

Supreme Court, U.S.
FILED
JUL 29 1992
OFFICE OF THE CLERK

(2)

No. 92-005

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1992

RICHARD J. MACKENSWORTH,
Petitioner, Pro Se,

VS.

SEA-LAND SERVICE, INC.,
and UNITED STATES OF AMERICA,
Respondents.

On Petition for a Writ of Certiorari to The United States Court of Appeals for The Ninth Circuit

RESPONDENT SEA-LAND'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether a stay is necessary to preserve appellate jurisdiction in an *in rem* admiralty case?

PARTIES TO THE PROCEEDING

Petitioner: Richard J. Mackensworth

Respondents: Sea-Land Service, Inc.*

United States of America

Other parties below:

SS AMERICAN MERCHANT**

San Francisco Bar Pilots***

Marine Engineers Beneficial Association Pension Trust***

Port Authority of Guam***

Ameron, Inc.***

Kansas Packing Co. of California***

Benito Gonzales***

Hawaii Stevedores, Inc.***

Marine Terminals Corporation***

Masters, Mates & Pilots' Individual Retirement Account***

Continental Illinois National Bank and Trust Co. of Chicago, solely as Trustee for: HFC Leasing Inc., Great American Insurance Co., and the Provident Bank****

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* Pursuant to Sup. Ct. R. 29.1, Sea-Land is a wholly owned subsidiary of CSX Corporation, a Delaware corporation. There are no wholly owned subsidiaries of Sea-Land.

** As this is an admiralty *in rem* action to foreclose maritime liens against a vessel, the vessel SS AMERICAN MERCHANT was a defendant in the district court until it was sold at a judicial foreclosure sale, after which its proceeds of sale became the defendant substitute *res*.

*** Parties who asserted maritime liens against the vessel in the district court who either reached a settlement with Sea-Land on their lien claims, or who dismissed their lien claims.

**** Trustee for owners of the SS AMERICAN MERCHANT who collectively assigned their interest in the vessel to Sea-Land.

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No. 92-005

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1992

RICHARD J. MACKENSWORTH,
Petitioner, Pro Se,

VS.

SEA-LAND SERVICE, INC.,
and UNITED STATES OF AMERICA,
Respondents.

On Petition for a Writ of Certiorari to The United States Court of Appeals for The Ninth Circuit

RESPONDENT SEA-LAND'S BRIEF IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals dated February 27, 1992, is unreported and is reproduced at Res. App. A-1—A-6. The order of the court of appeals denying rehearing is unreported and is reproduced at Res. App. A-7. The order of the district court dated July 31, 1989, is unreported and reproduced at Res. App. A-8—A-11. The order of the district court dated August 11, 1989, is unreported and reproduced at Res. App. A-12—A-13. The order of the court of appeals denying petitioner Mackensworth's petition for writ of mandamus dated April 3, 1990, is unreported and is reproduced at Res. App. A-23.

JURISDICTION

The judgment of the court of appeals dismissing the appeal was entered on April 28, 1992. Res. App. A-24. The petition for *certiorari* was filed on June 29, 1992. This Court has jurisdiction under 28 U.S.C. § 1254(1).

ADDITIONAL STATUTES AND RULES INVOLVED

RULE C. Action in Rem: Special Provisions

(1) When available. An action in rem may be brought:

(a) To enforce any maritime lien;

(b) Whenever a statute of the United States provides for a maritime action in rem or a proceeding analogous thereto.

Except as otherwise provided by law a party who may proceed in rem may also, or in the alternative, proceed in personam against any person who may be liable.

Statutory provisions exempting vessels or other property owned or possessed by or operated by or for the United States from arrest or seizure are not affected by this rule. When a statute so provides, an action against the United States or an instrumentality thereof may proceed on in rem principles.

RULE E. Actions In Rem and Quasi In Rem: General Provisions

(1) Applicability. Except as otherwise provided, this rule applies to actions in personam with process of maritime attachment and garnishment, actions in rem, and petitory, possessory, and partition actions, supplementing Rules B, C, and D.

F.R.C.P. 15(a) provides:

(a) Amendments. A party may amend the party's pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, the party may so amend it at any time within 20

days after it is served. Otherwise a party may amend the party's pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires. A party shall plead in response to an amended pleading within the time remaining for response to the original pleading or within 10 days after service of the amended pleading, whichever period may be the longer, unless the court otherwise orders.

F.R.C.P. 62(d) provides:

(d) Stay Upon Appeal. When an appeal is taken the appellant by giving a supersedeas bond may obtain a stay subject to the exceptions contained in subdivision (a) of this rule. The bond may be given at or after the time of filing the notice of appeal or of procuring the order allowing the appeal, as the case may be. The stay is effective when the supersedeas bond is approved by the court.

STATEMENT OF THE CASE

In 1984 petitioner filed a seaman's personal injury claim in the New Jersey District Court, *in rem* against the SS AMERICAN MERCHANT ("Vessel"), and *in personam* against the Vessel's bareboat charterer and his employer, United States Lines, Inc. ("USL").[1] Res. App. A-2. That action was stayed by operation of 11 U.S.C. § 362 when USL filed bankruptcy in 1986. Pet. App. II-3; Res. App. A-2.

In 1987, after obtaining relief from the bankruptcy stay, the United States brought an admiralty action, *in rem*, in the United States District Court for the Northern District of California to foreclose a First Preferred Ship Mortgage it held in the Vessel.

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[1] USL was the Vessel's owner *"pro hac vice."* The legal owner of the Vessel was Continental Illinois National Bank and Trust Co. of Chicago ("CINB") as trustee for the owners, HFC leasing Inc., Great American Insurance Co., and the Provident Bank (collectively "Owners"). Prior to the United States' mortgage foreclosure action, respondent Sea-Land Service, Inc. ("Sea-Land"), had been assigned all ownership rights in the Vessel, including the right to any remnants of the Vessel's proceeds of sale. Res. App. A-2.

Res. App. A-2. The Vessel was thereafter arrested pursuant to Rule C of the Supplemental Rules for Certain Admiralty and Maritime Claims ("Supp. Rules"), and sold. *Id.* The sale proceeds of $5,000,000 were deposited in the court's registry as a substitute *res*. *Id.*

A number of parties, including petitioner, were granted relief from the bankruptcy stay to intervene in the California action to assert maritime lien claims. Res. App. A-3. Petitioner's claim in intervention asserted a maritime lien claim for personal injuries alleged to have occurred on board the Vessel on June 13, 1981. Res. App. A-9

In February, 1988, the court entered a default against all persons claiming an interest in the vessel who had failed to file a complaint in intervention against the Vessel. Res. App. A-3. Subsequently, the court granted the United States' motion that it be paid $3,829,950.32 to satisfy its first preferred mortgage claims. Pet. App. I-5. As the full amount of all remaining liens asserted[2] totalled $891,094.45, a surplus of proceeds existed because at least $278,955.23, plus accruing interest, would have remained in the registry of the court even if all the lien claims alleged were paid in full. Pet. App. I-2; Res. App. A-3.

Petitioner Mackensworth moved to enjoin various parties, including respondent Sea-Land, from defending against his and other intervenors' claims, asserting that they had waived their right to defend such claims by virtue of the language in their respective Verified Claims and averments to the United States' complaint. Pet. App. II-1—II-5. The court held that no such waivers had occurred and that there was no defect in the parties' appearances. *Id.*; Res. App. A-6.

Petitioner Mackensworth also moved under Federal Rule of Civil Procedure 18(a) to "join" a wholly different and discrete personal injury claim with his pending complaint in intervention. Res. App. A-9—A10. This motion was treated by the court as a motion for leave to add, by amendment, a new claim under

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[2] Including petitioner Mackensworth's lien claim in the amount of $44,000. Pet. 13; Pet. App. II-2.

Federal Rule of Civil Procedure 15(a). The court found the new claim to be *prima facie* time barred under 46 U.S.C. § 763a, and denied the motion because the amendment would have been futile. *Id.*

On Sea-Land's motion the court ordered that petitioner's complaint in intervention be transferred to the Southern District of New York, along with substitute security in the full amount of petitioner's pending lien claim, plus interest and costs.[3] Res. App. A-3, A-10—A-11. After all claims of the other maritime lienors were dismissed or settled and paid pursuant to the court's distribution orders, Sea-Land was granted final distribution of the entire remnants of the proceeds of the Vessel's sale. Res. App. A-3—A-4.

Petitioner objected to the district court's denial of his motion to add a new claim, and the order fixing the substitute security for his action, by petitioning for mandamus. His petition was denied. Res. App. 23. Petitioner also appealed the disbursement order paying the United States' mortgage claim, but later voluntarily dismissed that appeal. Res. App. A-5. While petitioner made informal oral objections to some of the district court's orders disbursing portions of the *res*, he did not seek or even mention a stay of any of the orders. Res. App. A-4—A-5. In the meantime, the district court ordered disbursements of the *res* to eleven parties, over a two year period, and then made its final order distributing the remnants of the *res* to Sea-Land on August 1, 1990. Res. App. A-4—A-5.

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[3] In connection with providing adequate substitute security pursuant to Supp. Rule E(5)(a) Sea-Land proposed: (1) that Mackensworth's claim, which fell within the cover of USL's insurance, subject to a per claim deductible, be tendered to USL's insurers by delivering to USL's insurers the remaining deductible amount ($18,000) from the proceeds of the Vessel's sale; and (2) that the transfer order be conditioned on USL's insurers posting a letter of undertaking, or other suitable security in an amount to be set by the court, to serve as substitute security for the *res*. The district court adopted this proposal. Res. App. A-10—A-22. It is notable that the letter of undertaking posted is convertible to a bond upon demand of the petitioner. Res. App. A-18 ¶¶ 2 & 3.

None of the *res* remains in the registry of the Northern District of California and all lien claimants have been satisfied, transferred with security, or dismissed. A substitute *res* in the amount of petitioner's original lien claim, plus interest and costs, secures his action in the transferee district. Res. App. A-3, A5; Pet. 13; Pet. App. II-2.

SUMMARY OF ARGUMENT

Maritime lien foreclosure actions must be brought under federal admiralty jurisdiction against the vessel *in rem*. Admiralty *in rem* jurisdiction fails if the vessel *res*, or a substitute *res*, is released or distributed by the district court.

Although it is far from clear, petitioner appears to seek *certiorari* on two points, both of which are moot.

First, petitioner appears to object to the district court's denial of his request to add to his existing lien claim an additional maritime lien claim, arising out of wholly different facts and circumstances. The district court found that the additional claim was *prima facie* time barred and denied the request.

Second, petitioner also appears to object to the court approved substitute security posted to secure his original maritime lien claim pursuant to Supp. Rule E(5)(a). The district court ordered the petitioner's original lien claim and substitute security therefor transferred to a more convenient district. Petitioner does not oppose the transfer. Petitioner appears to limit his objection to nature[4] and amount[5] of the substitute security approved to accompany the transfer.

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[4] Petitioner complains that the letter of undertaking is not a bond, but as pointed out in note 3, *supra*., the letter is convertible to a bond upon demand.

[5] As far as can be discerned, petitioner's only grievances regarding the amount of the security are (1) that it does not cover the time barred claim which he was not permitted to add, and (2) it is not twice the amount of his claim.

After the district court entered its orders, petitioner sought mandamus, which was denied. Both of the objections raised in the petition for *certiorari* are moot, because petitioner failed to request a stay of the district court's orders which completely distributed the balance of the *res* over a two-year period. With the exception of the substitute security transferred with petitioner's original maritime claim, no *res* remains on which to predicate jurisdiction or to provide the petitioner with the relief he seeks, and for these reasons the petition for *certiorari* should be denied.

REASONS FOR DENYING THE WRIT

I

AFTER THE DISTRICT COURT COMPLETELY DISTRIBUTED THE *RES*, JURISDICTION IN THIS *IN REM* ADMIRALTY ACTION CEASED TO EXIST.

In rem jurisdiction derives entirely from the court's control over the defendant *res*. *Pennington v. Fourth Nat'l. Bank*, 243 U.S. 269, 272 (1917). This case would present the question of what effect a district court's release or complete disbursement of the *res* has on jurisdiction an *in rem* admiralty action. This is not a novel question. The circuit courts which have directly considered this question in an admiralty context have held that when the court has released or completely disbursed the *res*, *in rem* jurisdiction is destroyed. *L.B. Harvey Marine, Inc. v. M/V RIVER ARC*, 712 F.2d 458, 459 (11th Cir. 1983); *Taylor v. Tracor Marine, Inc.*, 683 F.2d 1361, 1362 (11th Cir. 1982), *cert. denied*, 460 U.S. 1012 (1983); *Bank of New Orleans v. Marine Credit Corp.*, 583 F.2d 1063, 1067 (8th Cir. 1978); *Am. Bank of Wage Claims v. Registry of District Court of Guam*, 431 F.2d 1215, 1218 (9th Cir. 1970); *Parks v. B.F. Leaman & Sons, Inc.*, 279 F.2d 529, 532 (5th Cir. 1960); *Hamburg-Am. Line v. United States*, 1948 A.M.C. 888, 896 (1st Cir. 1948); *The DENNY*, 127 F.2d 404, 407 (3rd Cir. 1942); *Canal Steel Works, Inc. v. One Drag Line Barge*, 48 F.2d 212, 213 (5th Cir. 1931), *cert. denied*, 284 U.S. 647 (1931).

In American admiralty law it has long been recognized that the vessel is considered to be a separate legal entity, capable of suing

and being sued *in rem* for maritime obligations and torts. *Canadian Aviator, Ltd. v. United States*, 324 U.S. 215, 224 (1945). Over the years this legal fiction of "personifying" the vessel has been the subject of some criticism, particularly when attempts have been made to extend the doctrine beyond its traditional scope.[6] However, this Court has recognized that the fiction had real cause for its existence when created, and that it can still be very useful in the maritime context for the purpose of allowing actions against a vessel when its owner cannot be reached for suit. *Continental Grain Co., supra*, 364 U.S. at 23.[7]

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[6] This Court has refused to extend the fiction to the land based concept of *forum non conveniens*, *Continental Grain Co. v. Barge FBL-585*, 364 U.S. 19, 23-24 (1960); or where it would unduly narrow the scope of an Act of Congress. *See e.g., The CITY OF NORWICH (Place v. Norwich & N.Y. Transp. Co.)*, 118 U.S. 468, 503 (1886) (interpreting The Limitation Act, 46 U.S.C. § 183, 184); *Consumers Import Co. v. Kabushiki Kaishi Kawasaki Zosenjo*, 320 U.S. 249, 253 (1943) (interpreting The Fire Statute, 46 U.S.C. § 182).

[7] While four circuits have recently held that *in rem* jurisdiction is not destroyed when the *res* in a civil forfeiture action leaves the district, they have done so for reasons which are inapplicable to *in rem* admiralty cases. These circuits justify the departure from the traditional rule by the rationale that the United States submits to *in personam* jurisdiction by initiating the forfeiture, and because the admiralty rule of 'no *res*, no jurisdiction' is inappropriate in the context of civil forfeitures. *United States v. $12,390*, 956 F.2d 801, 804 (8th Cir. 1992) (distinguishing *Bank of New Orleans, supra*); *United States v. One Lot of $25,721 in Currency*, 938 F.2d 1417, 1419 (1st Cir. 1991); *United States v. Aiello*, 912 F.2d 4, 7 (2d Cir. 1990), *cert. denied*, 111 S. Ct. 757 (1991); *United States v. $95,945.18 United States Currency*, 913 F.2d 1106, 1109 (4th Cir. 1990). The Third Circuit avoided the issue by holding in the context of a currency forfeiture case that the *res* was an obligation of the Treasury, present everywhere in the United States. *United States v. $1,322,242.58*, 938 F.2d 433, 437-38 (3rd Cir. 1991). This Court has granted *certiorari* in a civil forfeiture case to consider the question of whether a stay or bond is necessary to preserve appellate jurisdiction. *Republic Nat'l. Bank of Miami v. United States*, 932 F.2d 1433 (11th Cir. 1991), *cert. granted*, 112 S.Ct. 1159 (Feb. 24, 1992).

Indeed, in the present case the bareboat charterer of the Vessel filed for bankruptcy protection and could not have been effectively sued *in personam*. Nor could the Vessel's true owner be sued *in personam* in this case, since all the claims asserted in the action occurred while the Vessel was in the hands of the bareboat charterer, USL. *The BARNSTABLE*, 181 U.S. 464, 468 (1901). It was the existence of this admiralty fiction of personification which made it possible for the maritime lien claimants, including petitioner, to assert and pursue their claims against the Vessel *in rem* while its bareboat charterer was subject to bankruptcy proceedings. Without this admiralty fiction, petitioner would not have a pending secured maritime lien claim.

In admiralty *in rem* cases the only exception to the 'no *res*, no jurisdiction' rule which is recognized, at least in principle, is where the *res* is removed from the jurisdiction by "an accidental or fraudulent or improper removal." *The RIO GRANDE*, 90 U.S. (23 Wall.) 458, 465 (1874); *see also Platoro, Ltd. v. Unidentified Remains of a Vessel*, 508 F.2d 1113, 1116 (5th Cir. 1975); *Am. Bank of Wage Claims, supra*, 431 F.2d at 1218.

Petitioner may not seek to resurrect jurisdiction in this case by relying on this exception. Here, as in *American Bank*, the exception is inapplicable because there is no evidence of any accident, fraud or impropriety in distribution of the *res*. All disbursements in this case were made pursuant to the district court's orders.[8]

A party objecting to release or disbursement of the *res* in an *in rem* admiralty action must seek a stay of the district court's orders concerning the *res* to preserve the jurisdiction necessary to assert appellate rights.[9] *Taylor, supra*, 683 F.2d at 1362; *Bank of New*

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[8] It is important to note that 'improper' in this context "does not mean error by the district court." *Stevedoring Servs. of Am. v. Ancora Transp.*, 884 F.2d 1250, 1253 (9th Cir. 1989). Rather, it means improper in the sense that the appellant was "defrauded." *Id.*

[9] Federal Rule of Civil Procedure 62(d) provides a means for appellants to obtain a stay of execution upon the posting of a supersedeas bond. "The purpose of requiring a supersedeas bond is to secure an appellee from loss resulting from the stay of execution." *Lamon v. City of Shawnee, Kan.*, 758 F. Supp. 654, 655 (D.Kan. 1991) (quoting

Orleans, supra, 583 F.2d at 1069; *Am. Bank of Wage Claims, supra*, 431 F.2d at 1218. In this case, petitioner's total failure to request a stay of execution of the distribution orders of which he complains, and the absence of any *res* in the district, renders his appeal moot, and mandates denial of his petition to this Court. Unlike civil forfeiture cases, where the government is the party whose possession of the *res* is being challenged, in admiralty cases the *res*, as here, is usually distributed to a wide variety of maritime lien claimants hailing from various locales. The rule accordingly has natural justification in admiralty because of the substantial, if not insurmountable, difficulty of tracing and recouping the distributed *res*. Res. App. A-5, n.3.

In the instant case the *res* was completely disbursed pursuant to the district court's orders and nothing remains of the *res* upon which jurisdiction may be predicated. Accordingly, the petition for *certiorari* should be denied.

Miami Int'l Realty Co. v. Paynter, 807 F.2d 871, 873 (10th Cir. 1986)). A supersedeas bond, however, is not a prerequisite to obtaining a stay of execution. The District Court has the discretion to order a stay of execution without the posting of a supersedeas bond. *Olympia Equip. v. W. Union Tel. Co.*, 786 F.2d 794, 796 (7th Cir. 1986); *Miami Int'l Realty Co. v. Paynter*, 807 F.2d 871, 873 (10th Cir. 1986); *Fed. Prescription Serv. v. Am. Pharmaceutical Ass'n.*, 636 F.2d 755, 757-758 (D.C. Cir. 1980); *Poplar Grove Planting and Refining Co., Inc. v. Bache Halsey Stuart, Inc.*, 600 F.2d 1189, 1191 (5th Cir. 1979); *Matter of Combined Metals Reduction Co.*, 557 F.2d 179, 193 (9th Cir. 1977). Here, the petitioner made no effort whatsoever to request a stay of execution. Res. App. A-4.

II

PETITIONER'S MISUNDERSTANDING OF THE LAW DOES NOT WARRANT GRANTING *CERTIORARI.*

A. The Quantum of Security Mandated By Supplemental Rule E(5)(a).

Petitioner also appears to seek review of the substitute security which accompanied the transfer of his action to another district under 28 U.S.C. § 1404(a). While petitioner does not object to the transfer itself, Pet. 18; Pet. App. III-5—III-6; he does appear to object to both the nature (a letter of undertaking) and amount ($44,000) of security the district court ordered to be posted pursuant to Supp. Rule E(5)(a) as a condition of the transfer. Pet. 19; Res. App. A-10, A-12—A-13, A-18.

Petitioner's misstatements of law regarding the adequacy of the substitute security do not warrant the grant of *certiorari*. Supp. Rule E(5)(a) accords the district court the discretion to approve the nature of the security taking the place of the *res*, and, within certain specified guidelines, to fix the amount of that security. *See* 7A J. Moore, B. Ward & J. Lucas, Moore's Federal Practice ¶ E.13[1], at E-603 — E-604 (2d ed. 1992) [hereinafter Moore's]. The Rule requires the district court to fix the principal sum of the security in an amount sufficient to cover the plaintiff's claim, fairly stated, with accrued interest and costs. *Id.* The letter of undertaking posted in this case fulfills these requirements. Pet. 13; Pet. App. II-2.; Res. App. A-3, A-18 ¶ 1.

The district court's discretion under Rule E(5)(a) is limited to the extent that the amount fixed for security may not exceed the lesser of twice the value of the plaintiff's claim, or the appraised value of the *res*. However, Rule E(5)(a) does not, as petitioner suggests, mandate that the district court set the security to be twice the value of his claim. *See* Moore's, *supra*. The personal injury claim which petitioner was held entitled to assert was secured by a letter of undertaking approved by the district court. Res. App. A-12—A-13. Letters of undertaking are well known and accepted means of posting security under Supp. Rule E(5)(a). Res. App. A-3, n.2; *See generally* Schoenbaum, *Admiralty and Maritime Law*, § 20-3, at p. 621, n. 12 (1987) [herein-

after Schoenbaum]. Moreover, petitioner is empowered by the letter of undertaking in this case to demand of the insurers who issued the letter that they file a bond to replace the letter of undertaking. Res. App. A-18 ¶ 2 & 3. Petitioner's original claim, fairly stated, is adequately secured under Supp. Rule E(5)(a). Pet. 13; Pet. App. II-2; Res. App. A-3, A-5.

B. Maritime Lien Priorities.

Throughout these proceedings petitioner has labored under the mistaken assumption that a maritime lien for a seaman's personal injury claim must always be paid before any other competing maritime or ship mortgage lien, because of its "superior priority." Pet. 12. He contends that the district court's failure to accord his lien the "highest priority," and to require that his claim be paid or settled first, before any other distributions of the substitute *res*, warrants review by this Court. However, it is hornbook law that priority among competing maritime lien claims does not become an issue unless the total potential value of the competing maritime lien claims, fairly stated, exceeds the total value of the *res*. Schoenbaum, § 8-6, at p. 263; Gilmore & Black, *The Law of Admiralty*, p. 734 (2nd ed. 1975).

In this case, the total value of all maritime liens asserted against the Vessel amounted to $891,094.45, and when combined with the United States ship mortgage claim of $3,829,950.32, the total of all lien claims as alleged amounted to $4,721,044.77. Res. App. A-3. Since the total of all lien claims asserted was less than the $5,000,000 sale proceeds, lien priorities were never in issue. Pet. App. I-2; Res. App. A-3.

CONCLUSION

The petition for *certiorari* should be denied.

Respectfully submitted,

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CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA
Plaintiff-Appellee,
SEA-LAND SERVICE, INC.
Claimant-Appellee,

vs.

S.S. AMERICAN MERCHANT (Official No. 457288),
her engines, boilers, tackle, apparel, appurtenances,
furnishings, etc., *in rem*, etc.,
Defendant.

vs.

RICHARD J. MACKENSWORTH
Plaintiff-intervenor-Appellant

No. 90-16412
D.C. No. CV-87-04888-SC

MEMORANDUM*

Appeal from the United States District Court
Northern District of California
Samuel Conti, District Judge, Presiding

Argued and Submitted January 14, 1992
San Francisco, California

Before: GOODWIN, FLETCHER, and BRUNETTI,
Circuit Judges.

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit execpt as provided by Circuit Rule 36-3.

OVERVIEW

Richard Mackensworth, intervenor-appellant, appeals pro se the district court's distribution of the vessel sale proceeds in an action by the United States to foreclose a first preferred ship mortgage on the vessel. Mackensworth's intervention arose from alleged maritime personal injuries. He also appeals the transfer of his personal injury action to the Southern District of New York and various interlocutory orders made during distribution of the vessel's proceeds.

FACTS AND PROCEDURAL HISTORY

On June 12, 1984, Appellant Mackensworth filed a personal injury claim against United States Lines (USL),[1] the charterer of the SS American Merchant (Vessel) and employer of Mackensworth, *in personam*, and against the Vessel, *in rem*, in the District of New Jersey. When USL filed a Chapter 11 bankruptcy petition on November 24, 1986, Mackensworth's claim was stayed.

On September 23, 1987, the United States subsequently brought an admiralty action *in rem* in the United States District Court for the Northern District of California to foreclose a First Preferred Ship Mortgage it held in the Vessel. The Vessel thereafter was arrested by the United States Marshal, pursuant to Rule C of the Supplemental Rules for Certain Admiralty and Maritime Claims of the Federal Rules of Civil Procedure, and sold. The proceeds of the sale were then deposited in the district court's registry as a substitute *res*.

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[1] The Vessel was under a "bareboat" charter, or lease, to USL who thus acted as the owner "*pro hac vice*." Legal title to the vessel was held by Continental Illinois National Bank and Trust Co. of Chicago as trustee for the owners, HFC Leasing Inc., Great American Insurance Co., and the Provident Bank. Prior to the commencement of the United States' mortgage foreclosure action, Sea-Land Services, Inc. (Sea-Land) had been granted the right to purchase the Vessel. It was assigned all of the ownership rights, including any and all of the ultimate recovery of the judicial sale of the Vessel.

Mackensworth, as well as the other maritime lien claimants, ultimately was granted relief from the bankruptcy stay and permitted to intervene in the admiralty action in the District Court of Northern California by filing an action against the Vessel, *in rem*. Mackensworth intervened on December 17, 1987.

On February 22, 1988, after previously having given notice of its intent to do so, the district court entered a default against all persons claiming an interest in the Vessel who failed to file a complaint in intervention against the Vessel. The total claims against the Vessel filed by all intervenors amounted to $891,094.45 and the proceeds from the Vessel's sale amounted to 5 million, leaving an excess of $3,829,050.32. Based on the fact that a surplus existed for the intervenors, the district court disbursed approximately 3.8 million dollars to the United States on July 29, 1988 in partial satisfaction of its claim. On June 8, 1990, the district court ordered entry of final judgment in favor of the United States pursuant to Rule 54(b) of the Federal Rules of Civil Procedure and ordered a disbursement to the United States in final satisfaction of its remaining claims not resolved by the first disbursement.

Finally, Sea-Land moved for the final distribution of the entire remnants of the last of the proceeds of the Vessel because no claimants to the Vessel remained in the district court. On August 11, 1989, Mackensworth's claim had been transferred to the Southern District of New York after Sea-Land posted a substitute security[2] covering the full amount of the claim Mackensworth had asserted. The remaining intervenors' claims had been satisfied from the Vessel's proceeds. On July 16, 1990, the court

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[2] Letters of Undertaking traditionally have been used in admiralty as a means of securing release from arrest of a vessel or its proceeds of sale. *See Alyeska Pipeline Serv. Co. v. Vessel Bay Bridge*, 703 F.2d 381, 384 (9th Cir. 1983), *cert. dismissed by*, 467 U.S. 1247 (1984); *J.K. Welding Co. v. Gotham Marine Corp.* 47 F.2d 332 (S.D.N.Y. 1931). The stipulation for value or other security is substituted for the vessel or vessel's proceeds and becomes the *res* subject to the court's jurisdiction. Fed. R. Civ. P. E(5) (Supplemental Rules for Admiralty and Maritime Claims).

entered its Final Order for Distribution on August 1, 1990, and ordered the entire remaining sale proceeds disbursed to Sea-Land. None of the res remains in the registry of the Northern District of California.

Mackensworth filed this appeal on October 1, 1990.

ANALYSIS

I. *Standard of Review.*

This court exercises its independent judgment with respect to questions of appellate jurisdiction, *Pride Shipping Corp. v. Tafu Lumber Co.*, 898 F.2d 1404, 1406 (9th Cir. 1990), and must dismiss the suit whenever it lacks jurisdiction. *Billingsley v. Commissioner*, 868 F.2d 1081 (9th Cir. 1989).

II. *Jurisdiction.*

It is well settled that *in rem* jurisdiction exists only where the subject matter of the action, or an appropriate substitute thereof, is within the jurisdiction of the court in which the action lies. *American Bank of Wage Claims v. Registry of the Dist. Court of Guam*, 431 F.2d 1215, 1218 (9th Cir. 1970). This principle applies in admiralty actions. *Id.* The release or complete disbursal of the vessel or substitute *res* destroys subject matter jurisdiction and renders moot any appeal concerning the *res*. *Id.; Alyeska Pipeline*, 703 F.2d at 384; *Pride Shipping*, 898 F.2d at 1408; *Stevedoring Servs. of Am. v. Ancora Transport, N.V.*, 941 F.2d 1378, 1382 (9th Cir. 1991) (court lost jurisdiction over a Rule B maritime attachment when the plaintiff failed to obtain a stay of execution of the judgment before the district court properly released the security).

In this case, the proceeds of the Vessel, deposited in the district court's registry, acted as the substitute *res*. *See American Bank*, 431 F.2d at 1218. When the proceeds were distributed to the various parties, leaving nothing in the district court's registry, the *in rem* jurisdiction was destroyed. Mackensworth never attempted to stay the distribution of any of the proceeds. Although he did make informal oral objections to the disbursements made to the

United States during two separate hearings, he never moved for or even mentioned a stay. Although he made one attempt at appealing the July 29, 1988 interlocutory disbursement order to the United States, he voluntarily dismissed the appeal when the district court refused to certify the appeal pursuant to 28 U.S.C. § 1292.

Under an exception to the prevailing rule, the release or disbursement of the *res* will not terminate jurisdiction if the *res* is released accidentally, fraudulently, or improperly. *Pride Shipping*, 898 F.2d at 1409; *Farwest Steel Corp. v. Barge Sea-Span 241*, 769 F.2d 620, 621 (9th Cir. 1985); *American Bank*, 431 F.2d at 1219. *Stevedoring*, 941 F.2d at 1382. It is clear that the district court did not release the res accidentally or fraudulently. All disbursements were made pursuant to the court's orders. It is also clear that the district court did not release the res improperly. As discussed above, the court disbursed the funds pursuant to the legitimate, settled claims of the United States and other maritime lienors. Its final disbursement to Sea-Land was made after it determined it no longer had any claimants before it. *See Stock West, Inc. v. Confederated Tribes of the Colville Reservation*, 873 F.2d 1221, 1225 (9th Cir. 1989) (clearly erroneous standard of review applies to factual findings on jurisdictional issues). Thus we cannot rely on the exception to support our jurisdiction and must dismiss this appeal.[3] We note that Mackensworth has not been harmed by the district court's proceedings. If he should prevail fully on his personal injury claim in the District Court of New York, there is an adequate monetary fund from which to satisfy his injury.

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[3] Mackenworth's suggestion that we "recall" the disbursements made by the district court and "make the *res* reappear" already has been rejected emphatically in our circuit. *See American Bank*, 431 F.2d at 1219. The district court ordered disbursements of the *res* to eleven parties over a two-year period. This court would be forced to trace, identify, recover, and then redistribute the disbursed funds—a time-consuming endeavor, and one brought on by Mackenworth's failure to seek a stay of any of the disbursements.

III. *Remaining Interlocutory Orders.*

We note that even if we had jurisdiction over this appeal, we would not be able to review the district court's transfer of Mackensworth's claim to the Southern District of New York. The decision in the transferee court is not yet final. The rule in this circuit is clear: transfer orders under 28 U.S.C. § 1404(a) are not appealable until final judgment has been rendered in the transferee district. *In Re Kemble*, 776 F.2d 802, 806 (9th Cir. 1985); *Kasey v. Molybdenum*, 408 F.2d 16, 18 (9th Cir. 1969). The proper avenue for review of transfer orders under § 1404(a) is by a writ of mandamus. *American Fidelity Fire Ins. v. United States Dist. Court*, 538 F.2d 1371, 1374 (9th Cir. 1976). Nor will we construe this appeal as a writ of mandamus. Mackensworth already has sought a writ of mandamus regarding this transfer order which we denied as being without error in an Order filed April 3, 1990.

Likewise, we cannot review the district court's denial of Mackensworth's Motion to Enjoin USL and Sea-Land from defending against his complaint in intervention, filed on November 7, 1988, or his Motion to Amend a Complaint, submitted as a Motion to Join a Complaint, filed on July 10, 1989. The district court's denials of each motion are interlocutory and therefore not appealable. 28 U.S.C. § 1292.

DISMISSED.

FILED
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CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA
Plaintiff-Appellee,

SEA-LAND SERVICE, INC.
Claimant-Appellee,

vs.

S.S. AMERICAN MERCHANT (Official No. 457288), her engines, boilers, tackle, apparel, appurtenances, furnishings, etc., *in rem*, etc.,
Defendant.

vs.

RICHARD J. MACKENSWORTH
Plaintiff-intervenor-Appellant

No. 90-16412
D.C. No. CV-87-04888-SC

ORDER

Before: GOODWIN, FLETCHER, and BRUNETTI, Circuit Judges.

Appellant's petition for rehearing is denied.

FILED
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RICHARD W. WIEKING
CLERK, U.S. DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

No. C 87 4888 SC

UNITED STATES OF AMERICA,
Plaintiff,

and

RICHARD J. MACKENSWORTH,
Plaintiff in Intervention,

v.

S.S. AMERICAN MERCHANT et al.,
Defendants.

ORDER DENYING MOTION TO AMEND AND GRANTING MOTION TO TRANSFER

This action comes before the court on two matters: plaintiff-in-intervention Richard J. Mackensworth ("Mackensworth"), appearing *pro se*, seeks to "join" a claim to his original complaint, pursuant to Fed. R. Civ. P. 18(a); and claimants Sea-Land Service, Inc. and United States Lines, Inc. ("Claimants") seek to transfer Mackensworth's intervention action *in rem* to the United States District Court for either the District of New Jersey or the Southern District of New York. Such transfer would be contingent upon the posting into the Registry of this Court a letter of undertaking by U.S. Lines' protection and indemnity underwriters, The United Kingdom Mutual Steam Ship Mutual Assurance Association (Bermuda) Limited (the "U.K. P&I Club"). Such letter of undertaking would serve as substitute security for the *res* in this action, i.e., the vessel's proceeds of sale, pursuant to

Rule E(5)(a) of the Supplemental Rules For Certain Admiralty and Maritime Claims.

1. *Mackensworth's Motion*

Mackensworth seeks to "join" a claim for respiratory system ailments allegedly caused by environmental toxics inhaled while he worked on the SS American Merchant. Mackensworth claims that his alleged respiratory injury manifested itself by December 31, 1982, "more than six years ago". Mackensworth's Claim By Joinder, at 6:3-5.

The Court shall treat Mackensworth's "joinder" motion as a motion to amend, pursuant to Fed. R. Civ. P. 15(a). Rule 18(a) deals only with pleading requirements, and does not treat substantively whether a party may amend his original complaint to include new claims. *See* Rule 18 Advisory Committee notes.

The Court finds that leave to amend is not warranted here, because Mackensworth's proposed amendment would be futile. *See California Architectural Building Products, Inc. v. Franciscan Ceramics, Inc.*, 818 F.2d 1466 (9th Cir. 1987); *Sackett v. Beaman*, 399 F.2d 884 (9th Cir. 1968) (futility is adequate grounds upon which to deny a motion to amend). Mackensworth's proposed amendment, a claim alleging respiratory system injuries caused by environmental toxics aboard the SS American Merchant, is a claim which Mackensworth admits manifested itself by December 31, 1982, "more than six years ago." Mackensworth's Claim By Joinder, at 6:3-5. This claim is barred on its face by the applicable three-year statute of limitations found in 46 U.S.C. § 763(a).

This proposed amendment would not "relate back" to the original complaint, as it does not arise out of the same "conduct, transaction, or occurrence set forth in the original pleading" as required by Fed. R. Civ. P. 15(c). Mackensworth's original complaint alleges injuries from one discreet incident—back injuries which allegedly stem from his loading of paint cans on the vessel on June 13, 1981. Therefore, as the proposed amendment would be barred by the statute of limitations, the Court declines

to grant Mackensworth leave to amend his complaint to add this new claim.

2. *U.S. Lines/Sea-Lands Service Motion to Transfer*

Claimants seek to transfer Mackensworth's complaint in intervention to the United States District Court for the District of New Jersey, or, in the alternative, to the Southern District of New York, pursuant to 28 U.S.C. § 1404(a). Mackensworth does not object to a transfer to the Southern District of New York.

The Court finds that several factors counsel transfer of this matter to the Southern District of New York. Mackensworth resides in New York, and U.S. Lines' files, trial exhibits, and its corporate counsel are all located in New York. Moreover, the witnesses which U.S. Lines intends to use reside in New York. The Southern District of New York is clearly a more convenient forum for the parties and witnesses to this action.

This lawsuit was originally brought in the Northern District of California simply because the subject vessel was at the time in this district. The vessel has since been sold, with the proceeds of sale deposited in the Court's Registry. The Court finds that good cause exists to transfer this *in rem* claim. *See Continental Grain Company v. Barge FBL-585*, 364 U.S. 19 (1960); *In re International Marine Towing, Inc.*, 617 F.2d 362 (5th Cir. 1980).

The Court orders that this transfer be contingent upon the posting into the Registry of this Court a letter of undertaking by U.S. Lines' protection and indemnity underwriters U.K. P&I Club, which letter of undertaking shall be subject to the approval of this Court and shall be in substantially the form of that suggested by Claimants. *See* Exhibit A, Lambert Declaration in Support of Joint Motion. Such letter of undertaking shall serve as the substitute security for the *res* in this action, i.e., the vessel's proceeds of sale, pursuant to Rule E(5)(a) of the Supplemental Rules For Certain Admiralty and Maritime Claims. The posting of this letter of undertaking shall coincide with the next rollover date of the certificates of deposit held in the Registry of this Court. At that time, in exchange for said letter of undertaking being posted, $18,000 of the vessel sale proceeds shall be paid to

Transport Mutual Services, Inc., as agents on behalf of the U.S. P&I Club.

In accordance with the foregoing, IT IS HEREBY ORDERED that:

(1) Mackensworth's motion to amend is denied; and

(2) Mackensworth's complaint-in-intervention is transferred to the district court for the Southern District of New York, contingent upon the posting of an appropriate letter of undertaking.

SO ORDERED.

Dated: July 31, 1989

Samuel C. Conti /s/
Samuel C. Conti
United States District Judge

FILED
AUG. 11, 1989
RICHARD W. WIEKING
CLERK, U.S. DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

RECEIVED
AUG 11, 1989
RICHARD W. WIEKING
CLERK, U.S. DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,
Plaintiff,

and

RICHARD J. MACKENSWORTH,
Plaintiff in Intervention,

v.

S.S. AMERICAN MERCHANT (Official No. 547288), her engines, boilers, tackles, apparel, furnishings and appurtenances, etc., *in rem*, et al.,
Defendants.

No. C 87 4888 SC

ORDER CONCERNING TRANSFER OF ACTION

WHEREAS Claimants Sea-Land Service, Inc. and United States Lines, Inc., debtor and debtor-in-possession, have caused an appropriate Letter of Undertaking to be posted into the Registry of this Court, in compliance with this Court's July 31, 1989 Order on their Joint Motion, it is therefore

ORDERED, that the Clerk of this Court is instructed to pay to Transport Mutual Services, Inc., as correspondent for the United Kingdom Mutual Steam Ship Assurance Association (Bermuda) Limited, the sum of $18,000 from the Proceeds of the judicial sale ("Proceeds") of the defendant vessel S.S. AMERICAN MERCHANT on the August 14, 1989 roll-over date of the Certificates of Deposit in the Registry of this Court containing said Proceeds; and it is further

ORDERED, that in connection herewith, the Clerk is instructed to notify Counsel submitting this Order when the check with said $18,000 payment is available, so he may promptly collect the same for transmission to Transport Mutual Services, Inc.; and it is therefore further

ORDERED, that the contingency in this Court's July 31, 1989 Order is now held satisfied, and the Clerk of this Court is instructed to effect the transfer of intervenor Richard Mackensworth's action to the Southern District of New York forthwith.

Dated: August 11, 1989

Samuel C. Conti /s/
Samuel C. Conti
JUDGE OF THE UNITED STATES
DISTRICT COURT

Submitted By:

GRAHAM & JAMES
JOHN A. EDGINTON
RUPERT P. HANSEN
Telephone: (415) 954-0361

By Rupert P. Hansen /s/
Rupert P. Hansen
Attorneys for Claimant
Sea-Land Service, Inc.

FILED
AUG 11, 1989
RICHARD W. WIEKING
CLERK, U.S. DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

GRAHAM & JAMES
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San Francisco, California 94111
Telephone: (415) 954-0200

Attorneys for Claimant
Sea-Land Service, Inc.

No. C 87 4888 SC

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,
Plaintiff,

and

RICHARD J. MACKENSWORTH,
Plaintiff in Intervention,

v.

S.S. AMERICAN MERCHANT (Official No. 547288), her engines, boilers, tackle, apparel, furnishings and appurtenances, etc., *in rem*, et al.,
Defendants.

CERTIFICATE OF COMPLIANCE RE CONDITION FOR TRANSFER OF ACTION

I, Rupert P. Hansen, certify:

1. That I am an attorney licensed to practice before this Court, and am associated with the law firm of Graham & James, counsel for Claimant Sea-Land Service, Inc. ("Sea-Land"). I

have personal knowledge of and could competently testify to all matters stated herein, except for those matters stated to be based on information and belief.

2. That attached to this Certificate as Exhibit "1" is an original Letter of Undertaking, binding on the United Kingdom Mutual Steam Ship Assurance Association (Bermuda) Limited ("U.K. Club"), which is the P&I Club Underwriter of Claimant United States Lines, Inc., debtor and debtor-in-possession and former bareboat charterer ("USL") of the defendant vessel, the S.S. AMERICAN MERCHANT (the "Vessel").

3. Said Letter of Undertaking is submitted in compliance with this Court's Order of July 31, 1989, to serve as the substitute security for the *res, i.e.,* the Vessel's proceeds of sale ("Proceeds"), pursuant to Rule E(5)(a) of the Supplemental Rules for Certain Admiralty and Maritime Claims, in respect of plaintiff-in-intervention Richard Mackensworth's action herein.

4. I am informed by the Clerk of this Court, and believe, that August 14, 1989 is the next roll-over date of the Certificates of Deposit containing the Proceeds held in the Registry of this Court. Said Letter of Undertaking is dated August 14, 1989, to coincide with the next rollover date of the Certificates of Deposit containing the Proceeds.

5. Said Letter of Undertaking is in substantially the same form as that suggested by Claimants Sea-Land Service, Inc. and USL in Exhibit "A" to Michael C. Lambert's Declaration filed in this action June 30, 1989 (*see,* Exhibit 2 hereto). The only changes are as follows:

In Paragraph No. "1":

". . . not exceeding the amount claimed in your complaint in intervention . . ." has been changed to ". . . not exceeding the $44,000 amount claimed in your complaint in intervention . . ."

and

". . . District of New Jersey . . ." has been changed to ". . . Southern District of New York . . ."

In the Concluding Paragraph:

". . . the signing of this letter by Transport Mutual Services, Inc., as agent, shall not be construed as binding upon Transport Mutual Services, Inc., . . ." has been changed to ". . . the execution of this letter by Mr. David W. Martowski shall not be construed as binding upon him personally, nor binding upon Transport Mutual Services, Inc. . . ."

I certify under penalty of perjury that the foregoing is true and correct and this Certification was executed by me on August 11, 1989, at San Francisco, California.

Rupert P. Hansen /s/

Rupert P. Hansen

EXHIBIT 1

Transport Mutual Services Inc.
21 West Street
New York, New York 10006/2908 (212) 514-8500
Telecopier: (212) 509-7929 • Telex TRT 177713/175957 • FTCC 824048 • TMSNY
Cable Address TRANMUTUAL, NEW YORK

Miami, FL Office
15045 N.W. 7th Avenue
Miami, Florida 33168/3109
(305) 685-0101
Telecopier: (305) 688-7271
Telex: 1561563 TMSM UT

San Francisco, CA Office
111 Pine Street, Suite 1550
San Francisco, CA 94111/3409
(415) 956-6537
Telecopier: (415) 956-0685
Telex: 823-267 TMS SF US

August 14, 1989

Mr. Richard Mackensworth
35-15 Leverich Street
Jackson Heights, NY 11372

RE: RICHARD MACKENSWORTH

v.

S.S. AMERICAN MERCHANT
Civil No. C-87-4888-SC (N.D. Cal.)
Alleged Injury On Board
S.S. AMERICAN MERCHANT—June 13, 1981

Dear Mr. Mackensworth:

In consideration for the release of the lien that you have asserted against the proceeds from the sale of the defendant vessel S.S. AMERICAN MERCHANT presently held in the registry of the United States District Court for the Northern District of California arising out of the alleged injury that you claim to have suffered as a result of an incident on board the S.S. AMERICAN MERCHANT on or about June 13, 1981 (the "*Incident*"), the United Kingdom Mutual Steam Ship Assurance Association (Bermuda) Limited ("*Association*") hereby agrees as follows:

1. In the event a final judgment (after all appeals, if any) is entered in your favor against the S.S. AMERICAN MERCHANT and/or her Owner(s) or former Bareboat charterer as a result of the Incident, the Association agrees to pay and satisfy such final judgment up to and not exceeding the $44,000 amount claimed in your complaint in intervention in the above referenced action, plus interest and costs, or any lesser amount adjudged by the United States District Court for either the Northern District of California or the Southern District of New York ("*Courts*") or agreed upon between the parties without final judgment being rendered.

2. Upon demand, the Association shall cause to be filed a bond in form and sufficiency of surety satisfactory to you or to either of the Courts in accordance with the provisions of Rule E(5) of the Supplemental Rules for Certain Admiralty and Maritime Claims of the Federal Rules of Civil Procedure securing your *in rem* claim against the AMERICAN MERCHANT in the above referenced action.

3. In the event the bond referred to under paragraph 2 above is filed, the undersigned Association shall have no further obligation under paragraph 1 above.

This letter is written entirely without prejudice as to any rights, defenses, immunities or limitations, statutory, contractual or otherwise, which the vessel or her Owner(s) or former Bareboat Charterer may have, none of which are to be regarded as waived and all of which are hereby reserved. The giving of this Letter of Undertaking is not to be construed as an admission of liability.

It is the intent of this Undertaking that your rights and the rights of the defendant vessel S.S. AMERICAN MERCHANT and her Owner(s) and former Bareboat Charterer shall be, and for all purposes shall be taken to be, precisely the same as they would have been had the S.S. AMERICAN MERCHANT remained under arrest and the proceeds from the sale of such vessel remained on deposit with either of the Courts or had the arrest been lifted by the posting of a bond.

It is understood and agreed that the execution of this letter by Mr. David M. Martowski shall not be construed as binding upon him personally, nor binding upon Transport Mutual Services, Inc., but is to be binding only upon The United Kingdom Mutual Steam Ship Assurance Association (Bermuda) Limited.

Very truly yours,

TRANSPORT MUTUAL SERVICES, INC.

By: David W. Martowski /s/

David W. Martowski
President

As Correspondent for the United Kingdom
Mutual Steam Ship Assurance Association
(Bermuda) Limited

EXHIBIT 2

TRANSPORT MUTUAL SERVICES, INC.
21 West Street
New York, New York 10004

June , 1989

Mr. Richard Mackensworth
35-15 Leverich Street
Jackson Heights, New York 11372

RE: RICHARD MACKENSWORTH

v.

S.S. AMERICAN MERCHANT
Civil No. C-87-4888-SC (N.D. Cal.)
Alleged Injury On Board
S.S. AMERICAN MERCHANT—June 13, 1981

Dear Mr. Mackensworth:

In consideration for the release of the lien that you have asserted against the proceeds from the sale of the defendant vessel S.S. AMERICAN MERCHANT presently held in the registry of the United States District Court for the Northern District of California arising out of the alleged injury that you claim to have suffered as a result of an incident on board the S.S. AMERICAN MERCHANT on or about June 13, 1981 (the "*Incident*"), the United Kingdom Mutual Steam Ship Assurance Association (Bermuda) Limited ("*Association*") hereby agrees as follows:

1. In the event a final judgment (after all appeals, if any) is entered in your favor against the S.S. AMERICAN MERCHANT and/or her Owner(s) or former Bareboat Charterer as a result of the Incident, the Association agrees to pay and satisfy such final judgment up to and not exceeding the amount claimed in your complaint in intervention in the above referenced action, plus interest and costs, or any lesser amount adjudged by the United States District Court for either the Northern District of California or the District

of New Jersey ("*Courts*") or agreed upon between the parties without final judgment being rendered.

2. Upon demand, the Association shall cause to be filed a bond in form and sufficiency of surety satisfactory to you or to either of the Courts in accordance with the provisions of Rule E(5) of the Supplemental Rules for Certain Admiralty and Maritime Claims of the Federal Rules of Civil Procedure securing your *in rem* claim against the AMERICAN MERCHANT in the above-referenced action.

3. In the event the bond referred to under paragraph 2 above is filed, the undersigned Association shall have no further obligation under paragraph 1 above.

This letter is written entirely without prejudice as to any rights, defenses, immunities or limitations, statutory, contractual or otherwise, which the vessel or her Owner(s) or former Bareboat Charterer may have, none of which are to be regarded as waived and all of which are hereby reserved. The giving of this Letter of Undertaking is not to be construed as an admission of liability.

It is the intent of this Undertaking that your rights and the rights of the defendant vessel S.S. AMERICAN MERCHANT and her Owner(s) and former Bareboat Charterer shall be, and for all purposes shall be taken to be, precisely the same as they would have been had the S.S. AMERICAN MERCHANT remained under arrest and the proceeds from the sale of such vessel remained on deposit with either of the Courts or had the arrest been lifted by the posting of a bond.

It is understood and agreed that the signing of this letter by Transport Mutual Services, Inc., as agent, shall not be construed as binding upon Transport Mutual Services, Inc., but is to be binding upon The United Kingdom Mutual Steam Ship Assurance Association (Bermuda) Limited.

Very truly yours,

TRANSPORT MUTUAL SERVICES, INC.

By: _____

As Correspondent for the United Kingdom Mutual Steam Ship Assurance Association (Bermuda) Limited

FILED
APR 2, 1990
CATHY A. CATTERSON CLERK, U.S.
COURT OF APPEALS
NINTH CIRCUIT

FILED
APR 3, 1990
RICHARD W. WIEKING
CLERK, U.S. DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 90-70115

RICHARD J. MACKENSWORTH,
Petitioner,

vs.

UNITED STATES DISTRICT COURT FOR
THE NORTHERN DISTRICT OF CALIFORNIA,
Respondent,

and

UNITED STATES OF AMERICA, et al.,
Real Parties in Interest.

DC# CV-87-4888-SC
Northern California (San Francisco)

ORDER

Before: WALLACE, SNEED, and LEAVY, Circuit Judges

The petition for writ of mandamus is denied. *See Bauman v. United States District Court,* 557 F.2d 650 (9th Cir. 1977).

FILED
APR 28, 1992
RICHARD W. WIEKING
CLERK, U.S. DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

No. 90-16412

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

SEA-LAND SERVICE, INC.
Claimant-Appellee

v.

S. S. AMERICAN MERCHANT, (Official No.457288), her engines, boilers, tackle, apparel, appurtenances, furnishings, etc., in rem, etc.,
Defendant

v.

RICHARD J. MACKENSWORTH,
Plaintiff-intervenor-Appellant

CT/AG# CV-87-04888-SC

APPEAL FROM the United States District Court for the Northern District of California (San Francisco).

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the Northern District of California (San Francisco) and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the appeal from the judgment of the said District Court in this cause be, and hereby is DISMISSED.

Filed and entered 2/27/92.

Supreme Court, U.S.
FILED
AUG 20 1992
OFFICE OF THE CLERK

No. 92-5

IN THE

Supreme Court of the United States

October Term, 1992

RICHARD J. MACKENSWORTH,

Petitioner, Pro Se,

vs.

SEA-LAND SERVICE INC.,

Respondent,

SOLICITOR GENERAL WAIVED RIGHT OF U.S.A. TO RESPOND.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY TO BRIEF IN OPPOSITION

RICHARD J. MACKENSWORTH
Petitioner, Pro Se
35-15 Leverich Street
Jackson Heights, NY 11372
(718) 429-5886

Dated: August 18, 1992

Seamans Personal Injury Claim
Filed Pursuant to 28 U.S.C. 1916

THE REPORTER COMPANY, INC.—Walton, NY 13856—800-252-7181
Syracuse Office, University Building, Syracuse, NY 13202—315-426-1235
NYC Office—30 Vesey St., New York, NY 10007—212-732-6978—800-800-4264
(8526—LC7-23—1992)

QUESTIONS PRESENTED FOR REVIEW (ADDITIONAL)

1. Whether Respondents (Sea-Lands) possession of the so called remnants is legal, in the face of the Confession of Judgment and *adequate considerations* there for, paid to the proper parties/entities?

2. If the Court finds, Respondent, (Sea-Land) and only Sea-Land, has Illegal possession of the *res*, will this Honorable Court recall same?

3. *AM I*, the "only and sole" remaining legal claimant?

The following are the parties to this proceeding

Graham & James
John A. Edington
Rupert P. Hanson
One Maritime Plaza
San Francisco, Calif. 94111
Attorneys for Claimant Sea-Land
Service Inc., Tel. 415 954-0200

U.S.A. Non-Respondent*

U.S. Attorney
Phillip A. Berns Esq.
450 Golden Gate Ave.
San Francisco, Calif. 94102
Tel. 415 556-3142

Solicitor General*
Department of Justice
Washington, D.C. 20530

* Waived right to respond

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(SEE PETITION)

No. 92-5

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992.

RICHARD J. MACKENSWORTH,

Petitioner, Pro Se,

v.

SEA-LAND SERVICE INC.,

Respondent.

SOLICITOR GENERAL WAIVED RIGHT OF U.S.A. TO RESPOND.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY TO BRIEF IN OPPOSITION

The Importance of this Case is not in Dispute

In "his" Brief in Opposition to the Petition, respondent only makes essentially vague arguments, on important and controlling questions, as to why the decision(s) of the Ninth Circuit is/are correct.

"He" fails to address many of petitioner's arguments with respect to the importance of the issues, "THAT NOW, AS THEN," probably constitute "Procedural Defect" at the District Court level and as they are detrimental to the interests of bona fide claimant intervenors.

Confessions of Judgment

(CR 19, LODGING 1, 2, 3, 4)
(Res. 4, Para. 5)

TO WIT:

NEITHER THE DISTRICT COURT ORDER

(CR 165, Pet. App. II)

Nor the

U.S. COURT OF APPEALS for the NINTH CIRCUIT'S "Order Dismissing" my Appeal (90/16412 Pet. App. VIII),

SAY IN SO MANY WORDS THAT my Motion to Enjoin (CR-133-137) *was based on* the/a *Confession of Judgment.*

THE CONFESSION OF JUDGMENT, while clouded by the efforts of the Originator to revert the Statutory Priority (46 U.S.C. 953a *et seq.*) to one in which/that is to say "they" (Shipowner Trustee) tout their *First Preferred Ship Mortgage* and "their" First Preferred Lien, into a seemingly *Highest Priority Lien,* NEGLECTING TO MENTION, that the "Preferred Maritime Lien" PRIMES ALL OTHER LIENS.

This constitutes a scenario more to "their" liking in which the "debtors" not the Law will decide which creditors will be paid!

THE CONFESSION OF JUDGMENT "leaves no doubt" that it is completely the work of "the legal owners," and it/who explicitly and irretrievably "WAIVES THE RIGHT" to claim restitution in the following words:

CINB as Shipowner Trustee specifically waives any and all right it may have to claim restitution of the Vessel and to defend this action on the Vessel's behalf. (Confession of Judgment, appended at Lodging 1, 2, 3, 4). (See *Overmyer v. Frick*, 92 Sup. Ct. Reporter 776, 405 U.S. 174) (Pet. 16)

Joinder

(Res. Pg. 4, Para. 6)

My "Notice of Joinder" filed pursuant to FRCP Rule 18(a), does not lend itself to the District Court to "treat" or otherwise play with, nor is the F.R.C.P. Rule (18a) half-witted! In plain English, (Pet. 8) reads may "JOIN" . . . as many claims, legal, equitable, or maritime, as he has against an opposing party.

For the District Court to "treat" my "NOTICE OF JOINDER" as a "Motion to Amend" flies in the face of Congressional intent, in that the Statute(s) do not favor back door dismissal of JOINDER, even if it is mis-joinder or non-joinder (Pet. 8-9). But, JOINDER is subject to the Court's power to direct an appropriate procedure for trying the claims, but not dismissal.

Notice of Joinder was converted to a Motion to Amend on Respondent's (Sea-Land's) Motion at CR 217.

Is Joinder Time Barred?

(Res. 5, Para. 1, 6 Para. 4)

Respondent's Opposition Brief blames the District Court (JUDGE), for/as the basis, for an Order (CR 230) alleging (Res. 5:1), "THE COURT FOUND THE NEW CLAIM TO BE PRIMA FACIE TIME BARRED UNDER 46 USC 763a, and denied the motion because the amendment would have been futile.

Respondent fails to address my argument that:

This STATUTE OF LIMITATION (SOL), as most other SOL'S, *does/do not inject itself into an ongoing timely filed action*, and Respondent has not shown in any credible way that it does, (as) in this Action.

My argument resides at pages 24 and 25 of the Petition (for Writ) and "Respondent" fails to address "it". (WHY?)

(Submitted on Motion of Non Party SEA-LAND.)

Is The *Res* Gone and Jurisdiction Destroyed? (*Passim*)

Respondent would have us believe that: only "real" parties and entities to the foreclosure action received disbursement(s) by District Court Order. Not so. TRANSPORT MUTUAL SERVICES RECEIVED $18,000; RESPONDENT (SEA-LAND) $5.4 MILLION.

No Challenge to Parties Listed on Page ii

Possession of the *res* by the U.S. Government and/or any parties to the proceeding on page ii of Respondent's Reply in Opposition, is not (NEGATIVE) being challenged by Petitioner!

Eleven Disbursements and One

Respondent (Sea-Land) states in the Reply Brief in Opposition (Res. Pg. A5, note 3) that:

> "The district court ordered disbursements of the *res* to eleven parties (page ii, the U.S.A. and Transport Mutual Services Inc.) over a two-year period."

Crocodile Tears

(*IBID*)

> "This Court (9th Cir.) would be forced to trace, identify, recover, and then redistribute the disbursed funds."

Recall (Ha Ha)

Thus Respondent makes it appear that: recovering the *res* from eleven distributees might pose difficulties.

RES IS GONE. BUT WHO GOT IT?

Respondent (Sea-Land) makes certain by "often repeat" that we know all *res* is gone, and jurisdiction destroyed (*sic*).

What He Doesn't Say

(LODGING 5)

In the District Court Order CR 272, Respondent (Sea-Land) was disbursed over $5.4 millions as remnants in a combined check (sister ship or consort ship deal) dated December 27, 1989 (27th month), "copy of both sides of 'check'" (remnants) at LODGING NO. 5. This is where the money is and comes from.

Whose Is It?

(REMNANTS)

A look at the Confession of Judgment could lead "one" to believe this $5.4 million belongs to me as the "Sole Legal Claimant." (I think so.) At any rate, the *res* is not irretrievably lost as they would have us believe.

Exploding Some Myths In Their Reply in Opposition

(LODGING 6-7-8)

N. J. Action Not *In Rem* (Res. 3)

1. Respondent alleges: Petitioner's Action filed in New Jersey in 1984 (84 Civ. 2294 ST), was filed *in rem*. Cause of Action listed as 46 USC 688 (Jones Act) and Jury Demand, not possible *in rem* and not specified otherwise, etc. (Res. 3, LODGING 6-7-8)

Assignment

2. Ownership rights (if any) were not transmitted to Respondent (Sea-Land) until December 16, 1987. The Confession of Judgment was filed at CR 19 on October 21, 1987, by the LEGAL OWNER.

Transfer of Petitioner

3. Respondent alleges (Res. 6)(.) Petitioner does not OPPOSE the transfer.

(RESPONDENT IS MOVANT OF TRANSFER)

(CR 206-7)

(See LODGING 8a-b-c)

Opposition to Transfer

4. Petitioner opposed transfer, and the undertaking, and the illegal disbursement of $18,000 TO A NON-PARTY.

My opposition to transfer, etc. is to be found at CR 218 and CR 219 and consists of some twelve (12) pages.

Petitioner Claim Filed

5. Respondent *et al.* supplied to the U.S. Court of Appeals (9th Circuit) the misinformation that petitioner intervened in the Admiralty Foreclosure Action on December 17, 1987. This is a mistake, as the certified copy of pertinent page of Docket shows.

(See Res. A3 and Lodging at 9-10)

The Check Remnants—Excess Proceeds

(LODGING 5)

Respondent claims the *res* is gone and jurisdiction destroyed. Maybe so, but RESPONDENT CANNOT DENY that in U.S.

District Court Check No. 1231, dated 12-27-89, they were receivers of more than $5.4 million dollars!

By Virtue of The Confession of Judgment

"I BELIEVE ALL MONEY"- (remnants, excess proceeds of sale, belong to ME as "sole surviving legal claimant in the Action." (See check at Lodging 5.)

Re Remnant:

Memo of Attorneys for Plaintiff United States of America

(Res 5:11-12)(CR 127, Lodging 11-12-13)

At CR 127, captioned "Memo Supporting Motion to Disburse Excess Proceeds of Sale," at page 4:20, this formal legal statement resides:

> Continental Illinois National Bank of Chicago (CINB), Trustee, the *in personam* defendant and former owner of the vessel, filed a "Claim, Answer, and Confession of Judgment" on its own behalf as Owner Trustee and on behalf of the defendant vessel. Therefore, the said *in personam* defendant has no right to claim any remnants of the proceeds of sale of the vessel . . . (.)
>
> . . . Additionally, United States Lines, the vessel's former bare-boat charterer and owner *pro hac vice*, also filed a "Claim, Answer, and Confession of Judgment" on behalf of the defendant vessel. Therefore, this latter entity also has no right to claim remnants of the proceeds of sale.

A Look Astern

If one hesitates now and projects the next line, to go the step beyond, we have respondent (Sea-Land) getting millions of dollars in *remnants* they are/were not entitled to.

And equally importantly, by virtue of "CINB's" specifically waiving any and all right it (Legal Owner, CINB) may have to claim restitution of the vessel and/or to DEFEND THIS ACTION ON THE VESSEL'S BEHALF, *they* (CINB) *waived the rights, therefore they had no right to defend, nor a right to defend that they* "CINB" *could assign to Sea-Land, as Sea-Land claims.*

Claim Jumpers

3. And for the same reason they (Sea-Land) should not have the "remnants" at my expense and injury thereby, NOR SHOULD THEY BE IN THIS COURT MAKING A MOCKERY OF JUSTICE, NOT UNLIKE INTERLOPERS AND CLAIM JUMPERS.

Conclusion

In view of the fact that I believe the "Confession of Judgment" is the preponderance of evidence and indicates respondent (Sea-Land) is not entitled to any remnants!

Therefore in proper sequence I maintain respondent (Sea-Land) is "POSSESSOR MALA FIDE," of the remnants.

I think it is clear that a disgraceful, greedy, miscarriage of justice has occurred; to too many bona fide claimants.

I ask this Honorable Court to right this wrong, and hopefully in the light, that on the facts, I am the "Sole Legal Claimant"!

Respectfully submitted,

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